Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

FERNAND L. LAUDUMIEY, III

and

DENNIS S. MANN,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[JUN 27 2003]

SUPREME COURT OF LOUISIANA

No. 03-B-0234

IN RE: FERDNAND L. LAUDUMIEY, III

and

DENNIS S. MANN

ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM

This disciplinary matter involves consolidated charges instituted against respondents, Fernand L. Laudumiey, III and Dennis S. Mann, two attorneys who are licensed to practice law in Louisiana, but currently on interim suspension.

UNDERLYING FACTS

Factual Background

In 1996, respondents entered into an employment arrangement with Ernest Aiavolasiti and Michael Palmisano, two non-attorney "legal assistants" who had been previously employed by another law firm.[1] Mr. Aiavol-

[1] Mr. Aiavolasiti and Mr. Palmisano were previously employed as legal assistants by the law office of Michael O'Keefe.

[footnote continued]

asiti and Mr. Palmisano indicated they had personal contact with their former firm's clients and felt that many of the clients would follow them after their departure from the firm.

At the suggestion of Mr. Aiavolasiti and Mr. Palmisano, respondents set up a law office on Canal Street in the City of New Orleans.[2] Respondents gave Mr. Aiavolasiti and Mr. Palmisano full responsibility and unfettered discretion to set up the office, and to handle all administrative matters and case acquisitions, development, and settlements.

In the first year, respondents put up approximately $270,000 of their own funds to finance the firm's operating account. Mr. Aiavolasiti and Mr. Palmisano had complete access to these funds. When the funds were exhausted after the first six months of the new firm's existence, respondents set up a $150,000 line of credit with a bank to finance the operation. Respondents did not monitor how the funds were being spent. It later turned out these funds were being used by Mr. Aiavolasiti and Mr. Palmisano, with respondents' knowledge, to pay "runners," persons who were used to solicit personal injury clients for the firm.

During the same time, Mr. Aiavolasiti and Mr. Palmisano provided a quick "transition" of approximately 800

After Mr. O'Keefe began to experience criminal and disciplinary difficulties arising from allegations that he engaged in runner-based solicitation, Mr. Aiavolasiti and Mr. Palmisano decided to leave the firm.

[2]Mr. Aiavolasiti and Mr. Palmisano advised respondents Canal Street was a good location as it was on a major bus line and near medical offices. Of course, Canal Street later became infamous as the home of the "Canal Street Cartel," a reference to the numerous attorneys with offices on that street who engaged in runner-based solicitation activities.

to 1,000 client files from their prior employer to respondents' firm. These clients never met respondents, and communicated exclusively with Mr. Aiavolasiti and Mr. Palmisano.

Eighteen months after its opening, respondents closed the Canal Street office based on concerns that the firm was not generating sufficient revenues. Respondents also began to experience trepidation about their arrangement with Mr. Aiavolasiti and Mr. Palmisano, as an insurance company had begun to question clients during depositions about how they came to be represented by respondents. After the Canal Street office closed, respondents had no further contact with Mr. Aiavolasiti and Mr. Palmisano.

Federal Investigation

Unbeknownst to respondents, Mr. Aiavolasiti and Mr. Palmisano began cooperating with federal authorities who were investigating the practice of runner-based solicitation. In connection with this investigation, Mr. Aiavolasiti and Mr. Palmisano agreed to meet with respondents while wearing hidden recording devices.[3] Mr. Aiavolasiti and Mr. Palmisano advised respondents that they had been subpoenaed to appear before a federal grand jury in connection with an FBI investigation. Respondents attempted to persuade Mr. Aiavolasiti and Mr. Palmisano to testify that respondents did not know Mr. Aiavolasiti and Mr. Palmisano were paying runners.[4] After the meet-

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[3] Ironically, at the meeting, respondent Mann disrobed to demonstrate that he was not wearing a recording device. The other men voluntarily followed suit, but the recording devices were apparently not detected.

[4] Specifically, respondent Mann made the statement: "[l]et me tell you, how about if you said something like this, tell 'em

[footnote continued]

ing, respondents gave Mr. Aiavolasiti and Mr. Palmisano $2,000 in cash to retain counsel and advised more funds were available.

Federal Criminal Proceedings

As a result of the information developed in the federal investigation, respondents were indicted in the United States District Court for the Eastern District of Lousiana on one count of obstruction of justice, a violation of 18 U.S.C. §1512(b)(1)(2). The indictment alleged respondents "did knowingly and intentionally corruptly persuade and attempt to persuade [Mr. Aiavolasiti and Mr. Palmisano] with intent to influence their testimony in an official proceeding. . . ." In March 2001, respondents pled guilty to the charges. In the factual basis for the guilty plea, respondents admitted that they had "full knowledge" that Mr. Aiavolasiti and Mr. Palmisano used runners to solicit personal injury clients while employed by respondents.

DISCIPLINARY PROCEEDINGS

Interim Suspension

Following their guilty pleas, respondents and the ODC filed a joint motion in this court requesting that respondents be placed on interim suspension. On April 11, 2001, we placed respondents on interim suspension and ordered that disciplinary proceedings be instituted.

[the grand jury] you paid runners to bring in cases but don't tell 'em that the lawyers knew anything about it." Likewise, respondent Laudumiey instructed Mr. Aisvolasiti and Mr. Palmisano to tell the grand jury that they had paid runners while working for another lawyer's office, but not while working for respondents.

In re: Laudumiey, 01-0925 (La. 4/11/01), 787 So.2d 275; *In re: Mann*, 01-0926 (La. 4/11/01), 787 So.2d 275.

Formal Charges

On July 23, 2001, the ODC filed identical sets of formal charges against both respondents. The formal charges set forth the facts underlying respondents' convictions, but did not set forth any specific rule violations. On August 22, 2001, the ODC filed a "first supplemental and amending formal charge" against respondents, which alleged respondents' criminal conviction constituted a violation of Rule 8.4 of the Rules of Professional Conduct[5] and warranted their "permanent disbarment from the practice of law."

Respondents' declinatory and preemptory exceptions asserting numerous due process violations were overruled. Subsequently, their disciplinary proceedings were consolidted and respondents filed admissions to the allegations of professional misconduct.

A formal hearing was conducted before the committee. Respondents testified at the hearing and presented mitigating evidence.

Recommendation of the Hearing Committee

The hearing committee found the ODC proved by clear and convincing evidence respondents violated Rule 8.4(b)

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[5] Rule 8.4(b) provides:

It is professional misconduct for a lawyer to:

(b) Commit a criminal act, especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

based on their commission of a criminal act adversely reflecting on their honesty, trustworthiness, or fitness as lawyers. The committee further found the crime of which they were convicted was a "serious crime" for purposes of Supreme Court Rule XIX § 19(B).

As aggravating factors, the committee recognized respondents' dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge the wrongful nature of the conduct, and substantial experience in the practice of law.[6] Also, specifically with regard to respondent Mann, the committee noted prior disciplinary offenses.[7]

In mitigation, the committee recognized character or reputation and, in the case of respondent Laudumiey, the absence of a prior disciplinary record. However, the committee specifically declined to find remorse as a mitigating factor, stating:

> Respondents knowingly entered into an enterprise with non-lawyers to solicit personal injury cases for personal gain. They gave unfettered discretion to individuals who were not lawyers and essentially gave them a blank check to run the operation. Little control or supervision was offered and the non-lawyers answered only to themselves. To suggest

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[6] Respondent Laudumiey was admitted to the practice of law in Louisiana in 1974. Respondent Mann was admitted in 1981.

[7] Respondent Mann was publicly reprimanded in 1999 based on disciplinary complaints alleging failure to timely satisfy a debt owed to a third party medical provider, and neglect of a legal matter and failure to supervise an employee resulting in prescription of a client's case. He was admonished for failing to account for and promptly deliver funds or property owed to a client or third party, as well as failing to place the property subject of the dispute in trust.

> that the two lawyers with more than twenty years of experience respectively should have known better is an understatement. Financial gain appears to be the underlying motivation. To be remorseful at this time because one has been caught is of little consequence.

Based on these factors, the committee recommended respondents be permanently disbarred from the practice of law.

Recommendation of the Disciplinary Board

The disciplinary board adopted the committee's findings of fact and conclusion that respondents violated Rule 8.4(b). The board noted that respondents breached duties owed to the public, resulting in actual injury to the legal profession. Relying on the ABA's *Standards for Imposing Lawyer Sanctions* and jurisprudence from this court, the committee concluded the appropriate baseline sanction for respondents' misconduct is disbarment. Applying the aggravating and mitigating factors cited by the committee, and relying on the Guidelines for Imposition of Permanent Disbarment set forth in Appendix E to Supreme Court Rule XIX, the board unanimously recommended respondents be permanently disbarred from the practice of law.

Respondents filed objections to the board's findings and the severity of the proposed sanctions, and reasserted their due process claims. Accordingly, the court docketed the matter for briefing and argument in accordance with Supreme Court Rule XIX, §11(G)(1)(b).

DISCUSSION

In their brief and argument to this court, respondents raise two procedural objections to the disciplinary board's recommendation of permanent disbarment. First, they contend the amendments to Supreme Court Rule XIX, §10(A)[8] and §24(A),[9] which provide for the sanction of permanent disbarment, may not be applied to their conduct in this case, as their conduct occurred prior to the August 1, 2001 effective date of the amendments. Second, they assert that the lawyer discip-

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[8]Supreme Court Rule XIX, §10(A) was amended to add the highlighted language:

> (1) Disbarment by the court. **In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.**

[9]Supreme Court Rule XIX, §24(A) was amended to add the highlighted language:

> A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. No lawyer may petition for reinstatement until six months before the period of suspension has expired. No lawyer may petition for readmission until five years after the effective date of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim suspension. **The court retains the discretion, in accordance with Section 10A of this rule, to permanently disbar a lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.**

linary system set forth in Supreme Court Rule XIX is unconstitutional. We will address these arguments separately.

Application of Supreme Court Rule XIX, §10 and §24 to Conduct Occurring Prior to August 1, 2001

In *In re: Ruffalo*, 390 U.S. 544, 550 (1968), the United States Supreme Court held that a lawyer facing discipline is "entitled to procedural due process, which includes fair notice of the charge." A review of the record in the instant case leaves no doubt that respondents were given fair notice that the ODC intended to seek to have them disbarred on a permanent basis. The ODC filed formal charges against respondents in July 2001. On August 1, 2001, we adopted amendments to Supreme Court Rule XIX, §10 and §24 which provide for permanent disbarment. Shortly after we adopted those amendments, the ODC filed a "first supplemental and amending charge" alleging that respondents' conduct warranted permanent disbarment from the practice of law. This amended charge was filed well in advance of the formal hearing. Respondents concede they had an adequate opportunity to present any appropriate mitigating evidence and to argue against imposition of permanent disbarment. Accordingly, we find no infringement of respondents' due process rights in these proceedings.

Nonetheless, respondents insist that application of the permanent disbarment amendments to conduct which occurred prior to the effective date of those amendments would be a violation of their substantive due process rights. In essence, respondents submit that if these amendments are applied to pre-amendment conduct, the amendments would violate the prohibition

on *ex post facto* laws found in Article I, §10 of the United States Constitution and Article I, §23 of the Louisiana Constitution.

We conclude nothing in Supreme Court Rule XIX, §10 and §24 has an *ex post facto* effect on respondents' case.[10] In *State v. Everett*, 00-2998 (La. 5/14/02), 816 So.2d 1272, this court explained the focus of the *ex post facto* analysis is whether the new law redefines conduct or increases the penalty by which the conduct is punishable:

> Art. I, §10 of the United States Constitution and La. Const. art. I, §23 prohibit ex post facto application of the criminal law by the State. The focus of the ex post facto inquiry is whether a new law redefines criminal conduct or increases the penalty by which the crime is punishable. *State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790; *State ex rel. Olivieri v. State*, 00-0172 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001).

Obviously, the amendments to Supreme Court Rule XIX, §10 and §24 do not redefine respondents' conduct, which remains controlled by the Rules of Professional Conduct in effect at the time of their offense.

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[10] Respondents have cited no jurisprudential authority from this court holding that a change in a bar disciplinary rule can result in an *ex post facto* law. In *Louisiana State Bar Ass'n v. Loridans*, 338 So.2d 1338 (La. 1976), the respondent argued that application of the 1971 amendments to the Articles of Incorporation could not apply to a crime committed prior to its effective date, as the increased penalties would be an *ex post facto* law. However, we did not reach the respondent's *ex post facto* arguments, as we found his conviction occurred after the amendment. *See also Louisiana State Bar Ass'n v. Ponder*, 340 So.2d 134 (La. 1976) (on rehearing).

However, respondents contend that the amendments have the effect of increasing the penalty they may receive for their misconduct.

The fallacy in respondents' argument is that nothing in the amendments to Supreme Court Rule XIX, §10 and §24 altered the penalties a lawyer may receive for professional misconduct. Both prior to and after the amendment, the most serious sanction a lawyer may receive under Rule XIX is the sanction of disbarment. The only change effected by the amendments relates to the ability of a disbarred attorney to seek readmission. However, respondents maintain that the elimination of this "right" to seek readmission exposes them to a greater sanction then they could have received at the time of their misconduct.[11]

Respondents have pointed to no constitutional authority or jurisprudence from this court which would indicate a disbarred attorney has a "right" to seek readmission to the bar of this state. The five-year minimum period for seeking readmission, as set forth in Supreme Court Rule XIX, §24, is a rule of procedure that does not vest any substantive rights in the attorney. The procedural nature of the rule is illustrated by our decisions in *In re: White,* 00-2732 (La. 4/25/01), 791 So.2d 602, and *Louisiana State Bar Ass'n v. Krasnoff,* 502 So.2d 1018 (La. 1987), in which we held that the

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[11] It is noteworthy that respondents were aware of the possibility of permanent disbarment at the time they committed their crimes. In the transcript of the wiretapped conversation of June 15, 2000, respondent Mann observes "they just passed a new thing now that they can disbar you for life." Ironically, when Mr. Aiavolasiti questions whether permanent disbarment would apply to respondents, respondent Mann replies, "I sure wouldn't like to be the one F***ing challenging it."

minimum period for applying for readmission may be extended or otherwise modified at our discretion. Thus, it is clear that our rules create no substantive right to seek readmission.

Our authority to regulate readmission to the bar is a fundamental component in the exercise of our plenary power over the practice of law. La. Const. art. V, §5(B); *Chittenden v. State Farm Mut. Auto. Ins. Co.*, 00-0414 (La. 5/15/01), 788 So.2d 1140; *In re: Bar EXAM Class Action*, 99-2880 (La. 2/18/00), 752 So.2d 159; *Succession of Wallace*, 574 So.2d 348 (La. 1991). Given this court's absolute discretion over readmission, it is beyond dispute that the court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis.

Thus, it is clear the amendments to Supreme Court Rule XIX, §10(A) and §24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed. *See Louisiana State Bar Ass'n v. Gremillion*, 320 So.2d 171, 174 (La. 1975) (amendment to bar disciplinary rules occurring after respondent's conduct "changed no substantive rights of respondent; it only provided a better procedural method to handle disciplinary actions.").

The procedural nature of the amendments is made clear by the language of Supreme Court Rule XIX, §10(A), which provides "the court *retains* the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the

practice of law." [emphasis added]. Likewise, we made this reasoning clear in our commentary accompanying the amendment:

> In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. These amendments reflect the judgment of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in consideration of the guidelines in Appendix E to the Rules of Lawyer Disciplinary Enforcement.

In sum, we hold that the amendments to Supreme Court Rule XIX, §10(A) and §24(A) do not create a new penalty. Accordingly, we conclude there is no merit to respondents' argument that these amendments constitute prohibited *ex post facto* laws.

Constitutionality of Supreme Court Rule XIX

Respondents next raise a constitutional challenge to the entire lawyer disciplinary system as set forth in Supreme Court Rule XIX. They contend the rule is unconstitutional because it improperly delegates the original jurisdiction of this court to non-judges on the hearing committee and disciplinary board, thereby depriving them of access to the courts.

La. Const. art. V, §5(B) provides this court has "exclusive original jurisdiction of disciplinary proceedings

against a member of the bar." In exercising this jurisdiction, we have held it is within our authority to appoint a commissioner to report findings and recommendations of discipline to this court. *Louisiana State Bar Ass'n v. Sackett,* 231 La. 655, 92 So.2d 571 (1957); *In re: Mundy,* 182 La. 148, 161 So. 184 (1935). While the scheme of Supreme Court Rule XIX provides for a system of hearing committees and a disciplinary board, there is no fundamental difference between this system and the commissioner system which we upheld in *Sackett* and *Mundy.*[12]

Despite respondents' arguments to the contrary, Supreme Court Rule XIX does not delegate our original jurisdiction over disciplinary proceedings to the hearing committees and the disciplinary board. Regardless of the recommendation of the disciplinary board, "it is the ultimate duty of this court to determine under the broad discretion vested in it what action, if any is to be taken against an attorney charged with misconduct. . . ." *Louisiana State Bar Ass'n v. Wheeler,* 243 La. 618, 145 So.2d 774, 777 (1962). When we consider a disciplinary case, we act as triers of fact and conduct an independent review of the record to determine whether the alleged

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[12]Respondents attempt to distinguish these cases, on the ground they were decided under Article VII, §10 of the Louisiana Constitution of 1921, which provided this court had "exclusive original jurisdiction in all disbarment cases involving misconduct of members of the bar *under such rules as the court may adopt. . .*" Respondents maintain that the current article, Article V, §5(B) of the Louisiana Constitution of 1974, does not contain the language "under such rules as the court may adopt," suggesting this court does not have the power to make rules for the disposition of disciplinary matters. However, respondents fail to recognize Article V, §5(A) of the 1974 Constitution, which provides this court "may establish procedural and administrative rules. . ."

misconduct has been proven by clear and convincing evidence. *In re: Quaid,* 94-1316 (La. 11/30/94), 646 So.2d 343, 348; *Louisiana State Bar Ass'n v. Boutall,* 597 So.2d 444, 445 (La. 1992). Accordingly, we find nothing in Supreme Court Rule XIX which contradicts the constitutional grant of original jurisdiction in bar disciplinary cases to this court.

Respondents next argue the system created under Supreme Court Rule XIX is flawed because there is no separation between the prosecutorial and adjudicative functions in the disciplinary system. In support, respondents point out that this court appoints the disciplinary board, which in turn appoints the disciplinary counsel, subject to the approval of this court. According to respondents, this link between the court, the disciplinary board, and the disciplinary counsel results in a merging of the prosecutorial and adjudicative functions.[13]

In *Allen v. State Board of Dentistry,* 543 So.2d 908 (La. 1989), we held that a system whereby the prosecutor of a state board drafted the board's findings of fact violated due process because it represented a commingling of prosecutorial and adjudicative functions in a single person. Nothing in Supreme Court Rule XIX creates such an impermissible commingling of functions. While the disciplinary board performs both an adjudicative and prosecutorial function, these functions are separated within the board. Supreme Court Rule XIX, §2(A).[14] The rule clearly delineates the func-

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[13]We note that respondents have produced no evidence of an actual commingling of functions; instead, their argument is confined to the structure of the rule.

[14]Supreme Court Rule XIX, §2(A) provides, in pertinent part:

> The agency [the disciplinary board] is a unitary entity. While it performs both prosecutorial and adjudicative

[footnote continued]

tions of the disciplinary board and the disciplinary counsel, avoiding the commingling of functions in a single person which we found objectionable in *Allen.*

Respondents' arguments relating to the role of this court in the process are also not well founded. As explained previously, the constitution grants this court exclusive original jurisdiction over disciplinary proceedings. The procedures we have enacted under Supreme Court Rule XIX foster the exercise of this jurisdiction and avoid any unfairness to the respondent lawyer.

In sum, we do not find Supreme Court Rule XIX is in violation of any constitutional provisions. Accordingly, respondents' arguments on this ground are without merit.

Determination of Misconduct and Appropriate Discipline

The charges against respondents are based on their pleas of guilty to the crime of obstruction of justice in violation of 18 U.S.C. §1512(b)(1)(2). In an attorney disciplinary proceeding based on the lawyer's criminal conviction, the issue of his guilt may not be relitigated. Because the lawyer's conviction, whether based on adjudication or guilty plea, is tantamount to a finding of his guilt beyond a reasonable doubt, the clear and convincing standard of proof that applies to disciplinary proceedings has already been satisfied. *In re: Bankston,* 01-2780 (La. 3/8/02), 810 So.2d 1113; *Louisiana State Bar Ass'n v. Wilkinson,* 562 So.2d 902 (La. 1990). In this type of proceeding, the sole issue to be determined is whether the crime warrants discipline and, if so, the

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functions, these functions should be separated within the agency insofar as practical in order to avoid unfairness.

extent thereof. *Louisiana State Bar Ass'n. v. Frank,* 472 So.2d 1 (La. 1985). The discipline to be imposed depends on the seriousness of the offense, the circumstances of the offense, and the extent of aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Brumfield,* 449 So.2d 1017 (La. 1984).

Clearly, the crime to which respondents pled guilty, obstruction of justice, is a very serious offense. This Court has not hesitated to disbar attorneys convicted of similar crimes which relate to the integrity of the judicial process. *See In re: Mithun,* 00-3174 (La. 1/5/01), 776 So.2d 426; *In re: Hingle,* 98-0774 (La. 9/18/98), 717 So.2d 636; *In re: Fabacher,* 94-0731 (La. 12/9/94), 646 So.2d 915; *Louisiana State Bar Ass'n v. Pitard,* 462 So.2d 178 (La. 1985); *Louisiana State Bar Ass'n v. Adams,* 363 So.2d 418 (La. 1978). Respondents' convictions are particularly egregious because the investigation they sought to impede related directly to runner-based solicitation in the legal profession. Under these circumstances, the only appropriate sanction for their misconduct is disbarment.

Having determined respondents must be disbarred, the only remaining question is whether the nature of respondents' conduct is so reprehensible as to prohibit them from being readmitted to the practice of law. In Appendix E to Supreme Court Rule XIX, we provided guidelines illustrating the types of conduct which might result in permanent disbarment. Guideline 2 applies to "[i]ntentional corruption of the judicial process, including but not limited to bribery, perjury and subornation of perjury."

Respondents' conduct clearly falls within the scope of this guideline. Their willful decision to attempt to subvert the judicial process convincingly demonstrates

they lack the good moral character and moral fitness necessary to practice law in this state. Supreme Court Rule XVII, §3(C). Respondents have blatantly disregarded and ignored the obligations they assumed when they took the oath as members of the bar of this state. In the face of this indisputable evidence of a fundamental lack of moral fitness, we can conceive of no circumstance under which we would grant readmission to respondents. Accordingly, they must be permanently disbarred.

DECREE

Upon review of the findings and recommendations of the hearing committee and disciplinary board, and considering the record, briefs, and oral argument, it is ordered that the names of Ferdnand L. Laudumiey, III, Louisiana Bar Roll number 8126, and Dennis S. Mann, Louisiana Bar Roll number 9095, be stricken from the roll of attorneys and that their licenses to practice law in the State of Louisiana be revoked. Pursuant to Supreme Court Rule XIX, §24(A), it is further ordered that respondents be permanently prohibited from being readmitted to the practice of law in this state. All costs and expenses in the matter are assessed against respondents in accordance with Supreme Court Rule XIX, §10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

APPENDIX B

[January 22, 2003]

LOUISIANA ATTORNEY DISCIPLINARY BOARD
IN RE: FERDNAND L. LAUDUMIEY, III
AND
IN RE: DENNIS S. MANN

01-DB-077 C/W 01-DB-078

RECOMMENDATION TO THE SUPREME COURT

PROCEDURAL HISTORY

These attorney disciplinary matters, each consisting of one count, were filed by the Office of Disciplinary Counsel ("ODC") against the Respondents, Fernand L. Laudumiey, III, and Dennis S. Mann ("Respondents"), both of New Orleans, on July 23, 2001.[1] The charges are based upon the guilty pleas entered by the Respondents to one count each of obstruction of justice in violation of Title 18, United States Code, Section 1512(b)(1) and (2) on the 14th day of March, 2001, in the United States District Court for the Eastern District of Louisiana. The indictment of Mr. Mann and Mr. Laudumiey sets forth that the Respondents knowingly and intentionally corruptly persuaded and attempted to persuade two former employees with the intent to influence their testimony before a federal grand jury. The grand jury had been convened in connection with the federal government's investigation of fraud and corruption in the legal and medical professions engaged in personal injury litigation.[2] The charges allege that the Respondents violated Rule 8.4(b)

(committing a criminal act reflecting adversely on a lawyer's honesty, trustworthiness or fitness) of the Rules of Professional Conduct.[2]

On August 16, 2001, the Respondents filed dilatory exceptions of vagueness. These exceptions were rendered moot by the filing of first supplemental and amending formal charges. On September 14, 2001, the Respondents filed declinatory and peremptory exceptions and answered the formal charges and supplemental and amending formal charges. The exceptions were overruled on October 19, 2001. The matters were consolidated on September 28, 2001. On November 12, 2001, Respondents filed amending and supplemental answers to the forml charges and first supplemental and amending formal charges wherein they "admitted" count one.

The matter was set for a mitigatory hearing on December 7, 2001, and on April 11, 2002, the Hearing Committee filed its report with the Board, recommending permanent disbarment of both Respondents. The matter was set for hearing before the board on July 11, 2002. ODC concurred with the recommendation of the Hearing Committee. The Respondents opposed arguing that the penalty is too harsh (they suggest a three year suspension), and that they were denied due process.[4] For the following reasons, the Board rejects the arguments of the Respondents, adopts the findings of the Committee and recommends that the Respondents be permanently disbarred.

UNDERLYING FACTS

The relationship between the Respondents and "legal assistance" Aiavolasiti and Palmisano began when Laudumiey was approached by Aiavolisiti, an acquaintance, about the possibility of entering into an employment

relationship. Aiavolasiti and Palmisano were employed by Michael O'Keefe as legal assistants. Mr. O'Keefe was in the midst of criminal and attorney disciplinary difficulties. Because Aiavolasiti and Palmisano had personal contact with many of O'Keefe's clients, they felt that if they were to leave O.Keefe's office, that many of the clients would follow them.[5] Ultimately, Aiavolasiti and Palmisano worked out a deal with Laudimiey and Mann. A law office was opened on Canal Street in June of 1996 and bank accounts (an operating account and a $150,000.00 line of credit) were established to fund the office. Aiavolasiti and Palmisano had unfettered access to these funds.[6]

Eventually, in May of 1997, the Respondents closed the Canal Street office. The office was not generating the revenue expected and the Respondents felt some trepidation in light of defendants, particularly State Farm, questioning clients at their depositions regarding how they came to be clients of the Respondents.[7]

Aiavolasiti and Palmisano made contact with the Respondents in June of 2000 and informed them that they were to appear before a federal grand jury. The Respondents had had no contact with Aiavolasiti and Palmisano since the closing of the Canal Street office. The four met and in a conversation between the men at the home of Laudimiey, the Respondents attempted to persuade Aiavolasiti and Palmisano to testify that the attorneys did not know that Aiavolisiti and Palmisano were paying runners.[8] The Respondents were also concerned that Aiavolasiti and Palmisano were going to admit that they took kickbacks from doctors and feared that Aiavolasiti and Palmisano might testify that the attorneys also took kickbacks from the doctors.[9]

At the time of the June 15, 2000 meeting, Aiavolasiti and Palmisano were cooperating with federal authorities and were wearing hidden recording devices. The Respondents were indicted on January 18, 2001 for obstruction of justice in attempting to influence the testimony of Aiavolasiti and Palmisano. On March 14, 2001, the Respondents pled guilty to the charges.

THE FORMAL CHARGES

Regarding matter number 01-DB-077, the formal charges read as follows:

COUNT 1

The respondent FERNAND L. LAUDUMIEY, III (Bar Roll No. 08126) was born September 13, 1944 and admitted to the Louisiana State Bar Association October 2, 1974 after graduating from Loyola University School of Law. In or around January 19, 1996 the respondent, acting in concert with others, agreed to hire two "legal assistants" for the express purpose of establishing a "runner based solicitation, personal injury law practice" in the city of New Orleans.

After hiring Ernest Aiavolasiti and Michael Palmisano as "legal assistants", the respondent, acting in concert with others, set up a second law office location on Canal Street in New Orleans from which the "runner based solicitation, personal injury practice" would be conducted. Additionally, the respondent, acting in concert with others, provided a source of funding to the "legal assistants" with which to make cash payments to "runners"; that is, individuals to whom sums of money were to be paid as compensa-

tion for locating and bringing in personal injury victims to the respondent's law office.

Unbeknownst to the respondent, Aiavolasiti and Palmisano were cooperating with federal authorities in connection with an ongoing Federal Grand Jury investigation. When the respondent learned that these "legal assistants" were to appear before the Federal Grand Jury, respondent, acting in concert with others, arranged to meet with the "legal assistants" at respondent's home on or about June 15, 2000. The "legal assistants" were utilizing consensual recording devices and attended the meeting. The respondent, acting in concert with others, had the "legal assistants" disrobe in an effort to assure the absence of recording devices. Detecting none, the respondent, acting in concert with others, did intentionally attempt to have both "legal assistants" provide false and/or misleading information to a Federal Grand Jury including testimony designed to deny the respondent's knowledge and participation in the "runner based solicitation, personal injury practice" scheme described above.

On or about the 18th day of January 2001, the United States Attorney for the Eastern District of Louisiana filed a Grand Jury indictment against the respondent charging him with one (1) count of knowingly and intentionally corruptly persuading and attempting to persuade Ernest Aiavolasiti and Michael A. Palmisano, Jr. with the intent to influence their testimony in an appearance before a Federal Grand Jury, all in violation of 18 USC Section 1512(b)(1) and (2).

Following the respondent's indictment, on or about March 14, 2001, the respondent entered a guilty plea to the single felony count reflected in the indictment. On May 23, 2001, the respondent was senten-

ced to three (3) years probation with the special condition that the respondent be placed on home detention for a period of six (6) months; perform 200 hours of community service; and pay a fine of $20,000.00.

On the 11th day of April 2001, the Louisiana Supreme Court entered an order interimly suspending the respondent and ordering that necessary proceedings be instituted in accordance with the Louisiana Supreme Court Rule XIX, Sections 11 and 19.

A First Supplemental and Amending Formal Charge was filed against the respondent to specifically allege that the respondent's criminal conviction in Federal Court constituted a violaton of Rule 8.4(b) of the Rules of Professional Conduct warranting his permanent disbarment from the practice of law.

Regarding matter number 01-DB-078 relative to Mann, the charges are identical except as to the personal information and the sentence imposed. Mann was sentenced to three years probation with the special condition that he be placed on home detention for six months and was fined $40,000.00. Paragraph one, sentence one of the charges against Mr. Mann reads as follows: "The respondent DENNIS S. MANN (Bar Roll No. 09095) was born March 24, 1954 and was admitted to the Louisiana State Bar Association April 24, 1981 after graduating from Tulane University School of Law."

STIPULATIONS

In their Amended and Supplemental Answer to Formal Charges and First Supplemental and Amending Formal Charge, the Respondents "admitted" count one.

The Factual Basis which the Respondents signed provides that they "knew Aiavolasiti and Palmisano were using runners to bring in cases."[10]

THE HEARING COMMITTEE'S REPORT

The Committee made the following factual findings:

1. Respondents pled guilty to one count of obstruction of justice by knowingly and intentionally corruptly persuading and attempting to persuade Ernest Aiavolasiti and Michael A. Palmisano Jr. with the intent to influcnce their testimony in an appearance before a Federal Grand Jury, in violation of 18 USC §1512(b)(1) and (2);
2. Respondents pled guilty to a felony.
3. Respondents had knowledge of the facts surrounding the runner-based activities of Ernest Aiavolasiti and Michael A. Palmisano, Jr. while such activities were occurring.

The Committee determined that the Respondents pled guilty to obstruction of justice, a serious crime which "addresses the heart of the legal system."[11] In telling witnesses to lie to a federal grand jury, the Respondents violated Rule 8.4(b). After reviewing Rule XIX, §10C (factors to be considered in imposing sanctions) and considering the *ABA Standards for Imposing Lawyer Sanctions* ("*ABA Standards*"), specifically ABA Standard 5.11,[12] the Committee found the baseline sanction of disbarment to be appropraite. It was the Committee's opinion that the Respondents' behavior was knowing, deliberate and strategically formulated. Regarding the underlying conduct relative to runner-based solicitation, the Committee determined that the Respondents knowingly entered into an enterprise with non-lawyers to solicit personal injury cases for personal gain. They gave unfettered discretion to individuals who were not lawyers and essentially gave them a blank check to run the operation. Little control or supervision was

offered and the non-lawyers answered only to themselves. The Committee suggested that to say that two lawyers with more than twenty years of experience respectively should have known better would be an understatement.

The Committee did not discuss damage.

As aggravating factors, the Committee found: dishonest or selfish motives; multiple offenses; refusal to acknowledge wrongful nature of conduct; and substantial experience in the practice of law. Additionally, in the case of Mann, the Committee found prior disciplinary offenses to be an aggravating factor.[13] As a mitigating factor, the Committee noted the Respondents' character or reputation and in the case of Laudumiey, the absence of a prior disciplinary record. The Committee, finding the testimony of Dr. Arey to be unpersuasive, declined to find the mitigating factor of mental disability or chemical dependency with respect to Mr. Laudimiey.

In recommending permanent disbarment for both Respondents, the Committee rejected the argument that permanent disbarment should not be imposed because the activitity which resulted in the disciplinary charge predated the August 1, 2001 effective date of the amendments to Rule XIX.[14] The Committee also rejected the argument that the conduct in question does not warrant permanent disbarment.

ANALYSIS

The powers and duties of the Disciplinary Board are defined in Section 2 of the Louisiana Supreme Court Rule XIX, Rules for Lawyer Disciplinary Enforcement. Subsection (G)(2)(a) states that the Board is "to per-

form appellate review functions, consisting of review of the findings of fact, conclusions of law, and recommendations of hearing committees with respect to formal charges . . . and prepare and forward to the court its own findings, if any, and recommendations."

Inasmuch as the Board is serving in appellate capacity, the standard of review applied to findings of fact is that of "manifest error." *Arceneaux v. Domingue,* 365 So.2d 1330 (La. 1978); *Rosell v. ESCO,* 549 So.2d 840 (La. 1989). The Board conducts a de novo review of the Hearing Committee's application of the Rules of Professional Conduct. *In re Hill,* 90-DB-004.

A review of the record in this matter reveals that the Hearing Committee's findings of fact are supported by the record and are not manifestly erroneous. The Respondents admitted the misconduct and the violation of the Rules of Professional Conduct as charged. The Board adopts the Committee's finding of facts and finds that the Respondents violated Rule 8.4(b) as admitted.

SANCTION

Given the violation, the Board must determine if the recommended sanction is appropriate.

Louisiana Supreme Court Rule XIX, Section 10(C) states that in imposing a sanction after a finding of lawyer misconduct, the Court or Board shall consider the following factors:

1. (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;

2. (2) whether the lawyer acted intentionally, knowingly, or negligently;

3. (3) the amount of actual or potential injury caused by the lawyer's misconduct; and

4. (4) the existence of any aggravating or mitigating factors.

Further, the Louisiana Supreme Court relies on the ABA Standards to determine the baseline sanction.[15]

In violating Rule 8.4(b), the Respondents violated a duty owed to the public. They acted intentionally and they caused injury to the legal profession.

ABA Standard 5.11 provides that disbarment is generally appropriae when a lawyer knowingly engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, or the like.

Considering the factors set out in Rule XIX, Section 10(C), the ABA Standards and the jurisprudence, disbarment is the appropriate baseline sanction.[16]

The Board adopts the aggravating and mitigating factors found by the Committee.

Appendix E to Rule XIX,[17] sets forth guidelines depicting conduct which might warrant permanent disbarment. Guideline 2 provides that "the intentional corruption of the judicial process, including but not limited to bribery, perjury and the subornation of perjury" is conduct for which permanent disbarment may be the appropriate sanction.

The Hearing Committee, considering all of the facts and circumstances, recommended that the Respondents be permanently disbarred. The Board agrees that the sanction of permanent disbarment should be imposed.

CONCLUSION

Finding that Respondents violated Rule 8.4(b) of the Rules of Professional Conduct and considering all of the foregoing, the Board adopts the factual findings of the Hearing Committee, accepts its recommendation and recommends that Fernand L. Laudumiey, III, and Dennis S. Mann be permanently disbarred from the practice of law in the State of Louisiana. The Board further recommends that Respondents pay all costs and expenses associated with these disciplinary proceedings.

LOUISIANA ATTORNEY DISCIPLINARY BOARD

Judy Y. Barrasso
John G. Beckwith, Sr.
Wanda A. Davis
Peter T. Dazzio
David R. Frohn
James L. Pate
Jack O. Whitehead, Jr.

BY: _____
REGINALD R. BROWN, SR.
FOR THE ADJUDICATIVE COMMITTEE

Robert E. Leake, Jr. – Recused.

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[1]On April 11, 2001, the Supreme Court entered an Order of Interim Suspension pursuant to Rule XIX, Section 19 as to each of the Respondents. The Court also ordered that the necessary disciplinary proceedings be instituted in accordance with Rules XIX, Sections 11 and 19. *In re Laudumiey*, 2001-0925 (La. 4/11/01); 787 So.2d 275. *In re Mann*, 2001-0926 (La. 4/11/01); 787 So.2d 275.

[2]ODC Exhibit 15 (Factual Basis).

[3]Supplemental and amending formal charges were filed on August 22, 2001, to specifically allege violations of Rule 8.4(b) of the Rules of Professional Conduct and to seek permanent disbarment.

Rule 8.4(b) provides in pertinent part:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> (b) Commit a criminal act especially one that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

[4]Respondents argue that they were denied due process because:

1. an alternate public members was substituted on the hearing committee less than twenty-four hours prior to the hearing, giving Respondents inadequate time to challenge his qualifications;
2. the Constitution grants exclusive jurisdiction over disciplinary proceedings to the Supreme Court, which cannot be delegated;
3. the disciplinary system violates separation of powers;
4. the rules and penalties are not linked, therefore a respondent is deprived of due notice of the penalty for engaging in the proscribed conduct; and
5. imposition of permanent disbarment violates the prohibition against the application of ex post facto laws.

[5]Hearing transcript, page 142, line 11 through page 144, line 5 (testimony of Mr. Laudumiey).

[6]Hearing transcript, page 35 line 22 through page 36, line 4 and page 81 lines 19-23 (testimony of Mr. Mann).

[7]Hearing transcript, page 41, line 2 through page 44, line 10 (testimony of Mann) and page 145, lines 15-25 (testimony of Mr. Laudumiey).

[8]ODC EXHIBIT #15 (Factual Basis). Also see, ODC Exhibit 11 (Transcript of Recorded Conversation of June 15, 2000).

[9]Hearing transcript, page 56, line 25 through page 57, line 7 (testimony of Mann). No evidence was submitted to suggest that the Respondents took money from doctors or that they were aware that Aiavolasiti and Palmisano accepted such funds.

[10]ODC Exhibit 15.

[11]Hearing Committee Recommendation, page 8.

[12]ABA Standard 5.11 provides:

> Disbarment is generally appropriate when:
>
> (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
>
> (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

[13]Mann's prior disciplinary record includes two prior matters. One involved a matter that prescribed and payment was ultimately paid by a malpractice carrier and the other involved a complaint by a doctor concerning an unpaid bill which had been guaranteed by Mann. See, ODC Exhibits 25 and 26.

[14]The Committee incorrectly noted that prior to the amendment of Rule XIX, the Supreme Court maintained the discretionary authority to permanently disbar attorneys and that the enactment of the new rule only serves to remove the discretionary authority from the Court and now makes permanent disbarment mandatory in certain instances. In fact, the new guidelines for permanent disbarment are not mandatory. The guidelines are not intended to bind the Court but to provide useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment.

[15]In re Quaid, 94-1316, p. 13 (La. 11/30/94); 646 So.2d 343, 350.

[16]There are several reported cases which hold that disbarment is appropriate for witness tampering, public bribery and similar conduct. In In re Fabacher, 94-0731 (La. 12/9/94); 646 So.2d 915, the Supreme Court held that an attorney's criminal conviction for witness tampering, in addition to his failure to comply with subpoenas issued by the Office of Disciplinary Counsel and other incidents of failure to cooperate warranted disbarment. Also see, In re Harrington, 98-0344 (La. 5/8/98); 710 So.2d 243,

[footnote continued]

in which it was determined that disbarment was warranted for an attorney's involvement in a conspiracy to harbor and transport illegal aliens, and for his guilty plea to charges of public bribery and obstruction of justice. Respondent offered money to witnesses to execute false affidavits in an attempt to minimize his role in connection with the illegal alien charges. See also, In re Mithun, 2000-3174 (La. 1/11/01); 776 So.2d 426 (respondent attempted to bribe an assistant district attorney in order to influence the outcome of a case); In re Hingle, 98-0774 (La. 9/18/98); 717 So.2d 636 (Respondent convicted of public bribery of a Louisiana State Bar Ass'n v. Pitard, 462 So.2d 178 (La. 1985) (Attorney paid the families of the three victims $5,000.00 in exchange for affidavits exonerating the client of wrongdoing.)

[17] Rule XIX, Appendix E provides:

> APPENDIX E. GUIDELINES DEPICTING CONDUCT WHICH MIGHT WARRANT PERMANENT DISBARMENT, SUGGESTED BY THE COMMITTEE TO STUDY PERMANENT DISBARMENT
>
> The following guidelines illustrate the types of conduct which might warrant permanent disbarment. These guidelines are not intended to bind the Supreme Court of Louisiana in its decision-making. It is hoped that these guidelines provide useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment.
>
> GUIDELINE 1. Repeated or multiple instances of intentional conversion of client funds with substantial harm.
>
> GUIDELINE 2. Intentional corruption of the judicial process, including but not limited to bribery, perjury, and subornation of perjury.
>
> GUIDELINE 3. An intentional homicide conviction.
>
> GUIDELINE 4. Sexual misconduct which results in a felony criminal conviction, such as rape or child molestation.
>
> GUIDELINE 5. Conviction of a felony involving physical coercion or substantial damage to person or property, including but not limited to armed robbery, arson, or kidnapping.
>
> GUIDELINE 6. Insurance fraud, including, but not limited to staged accidents or widespread runner-based solicitation.
>
> GUIDELINE 7. Malfeasance in office which results in a felony conviction, and which involves fraud.

GUIDELINE 8. Following notice, engaging in the unauthorized practice of law subsequent to resigning from the Bar Association, or during the period of time in which the lawyer is suspended from the practice of law or disbarred.

GUIDELINE 9. Instances of serious attorney misconduct or conviction of a serious crime, when the misconduct or conviction is preceded by suspension or disbarment for prior instance of serious attorney misconduct or conviction of a serious crime. Serious crime is defined in Rule XIX, Section 19. Serious attorney misconduct is defined for purposes of these guidelines as any misconduct which results in a suspension of more than one year.

APPENDIX C

[Filed April 12 2002]

DISCIPLINARY BOARD OF THE
LOUISIANA STATE BAR ASSOCIATION
DECISION OF
HEARING COMMITTEE NO. 11

IN RE: FERNAND L. LAUDUMIEY, III
DOCKET NO. 01-DB-077

Consolidated with

IN RE: DENNIS S. MANN
DOCKET NO. 01-DB-078

****

I. PROCEDURAL HISTORY

This matter was heard on Friday, December 7, 2001, regarding formal charges of professional misconduct against both Fernand L. Laudumiey, III, and Dennis S. Mann in these consolidated proceedings. Along with their answers, the Respondents filed both a Declinatory Exception Of Constitutional Lack of Competency and a Preemptory Exception Based upon Constitutional Grounds. The exceptions were overruled by the Committee Chair on October 19, 2001.

The factual allegations contained in the formal charges have been admitted by the Respondents in their first

supplemental and amending answer to the formal charges; specifically, both individuals admitted and pled guilty in federal court to one count of obstruction of justice.

The only issue to be decided by the Hearing Committee is the appropriate sanction to be imposed for the Respondents' misconduct. The Office of Disciplinary Counsel has suggested that, in light of the felony conviction and the special circumstances attendant to their conduct, the appropriate punishment should be permanent disbarment.

II. BRIEF FACTUAL SETTING

Respondents, Fernand L. Laudumiey, III and Dennis S. Mann were attorneys licensed in the State of Louisiana, and practiced general civil law. Respondents employed Ernest Aiavolasiti and Michael A. Palmisano, Jr. as legal assistants from 1996 to 1997. While so employed with Respondents, and with their full knowledge, Messrs. Aiavolasiti and Palmisano used runners to solicit personal injury cases for the Respondents. Respondents, through the legal assistants, would make cash payments to the runners.

In June 2000, Messrs. Aiavolasiti and Palmisano were subpoenaed, and later appeared as witnesses, before a federal grand jury investigating fraud and corruption in the legal and medical professions engaged in personal injury litigation. Prior to appearing before the grand jury, the legal assistants met with Respondent Laudumiey on June 13, 2000. Unbeknownst to Respondents, Messrs. Aiavolasiti and Palmisano were wearing consensual recording and transmitting devices provided by the Federal Bureau of Investigations (FBI). The legal assistants informed Respondents that they had been subpoenaed. Respondents informed them that, in light of

the subpoena, "This changes everything." Respondents requested another meeting which was set for June 15, 2000.

On June 15, 2000, a second meeting took place at Lakeview Harbor Restaurant and the legal assistants again were wearing consensual transmitting and recording devices supplied by the FBI. At this meeting, both Respondents were present. Respondent Laudumiey suggested that the parties relocate to his house at 998 Amethyst Street in New Orleans.

In an effort to determine whether the legal assistants were wearing recording listening devices, Respondent Mann asked that everyone strip their clothes off. Upon undressing, the parties discussed the grand jury investigation for more than two hours. Respondents attempted to consistently influence the grand jury testimony of Messrs. Aiavolasiti and Palmisano.

Respondent Mann asked the legal assistants to conceal from the grand jury that he and Laudumiey knew anything about using runners. Respondent Laudumiey also asked that the legal assistants inform the grand jury that they had paid runners but did so while working for another laywer's office.

In a final effort to influence the testimony of the legal assistants, Respondents gave them $2,000.00 to hire an attorney and informed them that there was more if needed.

Respondents were re-indicted on March 14, 2001 and entered their guilty plea to a single felony count of obstruction of justice in violation of 18 USC §1512(b)-(1) and (2). On April 11, 2001, the Louisiana Supreme Court entered an order interimly suspending both Respondents and ordering the necessary disciplinary proceed-

ings be instituted against them in accordance with Louisiana Supreme Court Rule XIX, Sections 11 and 19. The Office of Disciplinary Counsel alleges that Respondents' conduct and criminal convictions are a clear violation of Rule 8.4(b) of our Rules of Professional Conduct. On May 23, 2001, the Respondents were sentenced to three (3) years probation, home detention for a period of six (6) months and ordered to pay fines.

The Respondents do not contest the facts as set forth by the Office of Disciplinary Counsel. The Respondents offered evidence in mitigation in an effort to seek some sanction short of permanent disbarment. Respondents argue that their conduct predates the effective date of the amendment by the Supreme Court to Rule XIX (August 1, 2001).

III. RULES ALLEGEDLY VIOLATED

Disciplinary Counsel takes the position that Respondents' convictions are for a serious crime as defined by Rule XIX, §19 and represents a violation of the Rules of Professional Conduct, specifically, Rule 8.4(b).

IV. ANALYSIS OF EVIDENCE

In an effort to illustrate reasons for mitigation, Respondent Mann testified that he had been aware of the practice of paying for cases earlier on in his relationship with the legal assistants; however, he decided in 1997 to close the Canal Street office because "things just stunk". He further testified that, prior to closing the office, he discovered that the wife of Mr. Aiavolasiti had a working relationship with one of the referring physicians while employed with the Canal Street office and decided to fire her because of the appearance of impropriety.

Mr. Mann also offered testimony in mitigation that taxes were paid on all income derived from the Canal Street office and this was a "victimless crime". Mr. Mann further testified that as it concerns the tape recorded meeting with the legal assistants, he and Laudumiey only became upset during the conversation after discovering that the legal assistants had been receiving payments from doctors for referring patients. Money was offered to Messrs. Aiavolasiti and Palmisano to pay for an attorney only after being told that they could not afford counsel. After the Canal Street office closed, Mr. Mann acknowledged that he had nothing to do with Messrs. Aiavolasiti and Palmisano until the aforementioned meeting in June of 2000.

Testimony was solicited regarding two prior disciplinary matters concerning Respondent Mann. One involved a matter that prescribed and payment was ultimately paid by a malpractice carrier and the other involved a complaint by a doctor who was upset that his bill was not payed in full after being guaranteed by Respondent Mann. Both matters were resolved without any finding of fraud or wrongdoings. Mr. Mann did admit that he agreed to a public reprimand concerning the latter case.

Six witnesses testified for Respondents Mann and Laudumiey: Judge Joseph Tiemann, Robert Tucker, Thomas Gennusa, Sibel Mann, Fernand Laudumiey, IV and Dr. James Arey.

Judge Tiemann testified that he has known Mr. Laudumiey since graduating from law school. Although they did not socialize together, Judge Tiemann stated that he has never known him to do anything untoward and certainly nothing to merit some kind of disciplinary action. He further stated that he has known him to be nothing other than upright and ethical.

Robert Tucker, a local businessman, testified on behalf of Mr. Mann. Mr. Tucker stated that his relationship with Mr. Mann was limited to socializing. To the best of his knowledge, he only knew Mr. Mann to be an honorable, upstanding person. He further stated that he had never engaged Mr. Mann in any commercial or legal matters.

Thomas A. Gennusa, II testified on behalf of his life-long friend, Fernand Laudumiey. Mr. Gennusa informed the Committee that he has known Mr. Laudumiey for more than 40 years and was surprised to learn of the allegations. He indicated that the allegations were not a reflection of the person that he has known. Mr. Gennusa also informed the Committee that he was aware of a host of personal problems which may have attributed to poor judgment that may have been exercised by Mr. Laudumiey in deciding to engage in a business arrangement with Messrs. Aiavolasiti and Palmisano.

Mr. Gennusa stated that his friend was in the midst of a second divorce and was under a great deal of pressure. According to Mr. Gennusa, Mr. Laudumiey's drinking may have also played some part in Respondent's lapse in judgment. Since surrendering his license. Respondent Laudumiey has been employed by Mr. Gennusa as a legal assistant and has performed quality work.

Fernand Laudumiey, IV also testified on behalf of his father. He has been an attorney licensed to practice in the state of Louisiana since 1996. He also stated that his father had been under a great deal of pressure since the death of his grandmother in 1995 and also noted that his father had begun to drink excessively after his mother's death.

Testimony was afforded by Mrs. Sibel Mann, wife of Mr. Mann. She indicated that her husband was remorse-

ful for his actions and acknowledged that he had placed his family in jeopardy.

Dr. James Arey, Ph.D. in counseling and psychology testified on behalf of Respondent Laudumiey. He testified that he had seen Respondent since 1999 for what he initially thought was symptoms for a classic alcoholic. Under questions from the Committee, Dr. Arey acknowledged that he had performed no testing that would support his conclusions and his clinical opinion was based solely on personal observation and conversations that he had with Mr. Laudumiey. He concluded that Respondent was suffering from alcohol abuse and in his opinion was not a alcoholic. No secondary information was available to support his findings.

In fact, the Committee, after considering the testimony of all relevant witnesses as well as the Respondents, does not find Dr. Arey's opinion persuasive. It should be noted that he gave two diagnoses for Mr. Laudumiey, specifically, alcohol abuse and depression. After being questioned regarding the facts which support the conclusion, he backed off of his dual diagnoses. He further conceded that his opinion was based solely regarding his personal observations of Mr. Laudumiey and not diagnostic test results. The remaining diagnosis was alcohol abuse to which there was the question of malingering.

The sum and substance of the factual testimony for Mr. Mann was that he is generally considered a man of integrity and good character by his peers, just lacking good judgment in this particular instance.

Respondents Mann and Laudumiey concede the facts that form the basis of the criminal charge. When it became evident that the government was conducting an investigation into their past activities, Respondents

exacerbated the problem by deliberately attempting to effect the Grand Jury testimony of Messrs. Aiavolasiti and Palmisano. Respondents did not tell Mr. Aiavolasiti and Mr. Palmisano to tell the truth to the FBI or the Grand Jury. The conclusion that the Committee draws from this concession is that they knowingly entered into an enterprise with non-lawyers to solicit personal injury cases for personal gain. They gave unfettered discretion to individuals who were not lawyers and essentially gave them a blank check to run the operation. Little control or supervision was offered and the non-lawyers answered only to themselves. To suggest that two lawyers with more than twenty years of experience respectively should have known better is an understatement. Financial gain appears to be the underlying motivation. To be remorseful at this time because one has been caught is of little consequence.

V. FINDINGS OF FACT

The Committee finds the following pertinent facts in this matter:

1. Respondents pled guilty to one count of obstruction of justice by knowingly and intentionally corruptly persuading and attempting to persuade Ernest Aiavolasiti and Michael A. Palmisano, Jr. with the intent to influence their testimony in an appearance before a Federal Grand Jury, in violation of 18 USC § 1512(b)(1) and (2);
2. Respondents pled guilty to a felony.
3. Respondents had knowledge of the facts surrounding the runner-based activities of Ernest Aiavolasiti and Michael M. Palmisano, Jr. while such activities were occurring.

VI. DETERMINATION OF RULES VIOLATED

In any case involving a final conviction, the certificate of conviction of the Respondent is considered to be conclusive evidence of Respondent's guilt of the crime for which he has been convicted. See Exhibits ODC Nos. 13 and 14. Further, under Rule XIX, §19(E), the sole issue to be determined at the hearing shall be whether the crime warrants discipline and, if so, the extent thereof. Disciplinary Counsel has submitted sufficient proof to substantiate Respondents' conviction of a crime which meets the definition of a "serious crime" under Rule XIX, §19(B). The sole issues before the Committee are whether Respondents' crime warrant discipline and, if so, the extent thereof considering any mitigating circumstances not inconsistent with the essential elements of the crime. *In Re Huddleston,* 595 So.2d 1141 (1992).

The Respondents pled guilty to a crime which addresses the heart of the legal system. They obstructed justice by telling witnesses to lie to a Federal Grand Jury. Disciplinary Counsel has borne the burden of showing that the nature of the crime violates Rule 8.4(b). Accordingly, Respondents' criminal act warrants discipline.

VII. ASSESSMENT OF BASE LINE SANCTION

Considering the Committee's findings of fact, determination of rules violated, and after reviewing Rule XIX, §10C, the Committee is of the opinion that the base line sanction to be imposed upon Respondent is disbarment. See also ABA Standards Section 5.11.

Respondents contend that because the activity which resulted in the disciplinary charge predates the August 1, 2001 amendment by the Supreme Court to Rule XIX, they therefore should not be subjected to permanent disbarment. Alternatively, they contend that their conduct does not warrant the imposition of permanent disbarment. The Committee notes however that prior to the enactment of Rule XIX, the Supreme Court maintained the discretionary authority to permanently disbar attorneys. The enactment of the new rule only serves to remove the discretionary authority from the Court and now makes permanent disbarment mandatory in certain instances.

The Committee does not find the cases cited by Respondents in their pre-hearing memorandum to be persuasive. It is the Committee's opinion that their behavior was knowingly, deliberately and strategically formulated. The Committee finds that whether the activity falls under the old or new rule, the activities and conduct of the Respondents justify permanent disbarment. See *In re Gilmer P. Hingle*, 717 So.2d 636 (La. 1998); *In Re Jose Castro*, 737 So.2d 701 (La. 1999); *In re Richard Cuccia*, 752 So.2d 796; and *In re Thomas Grande*, 778 So.2d 580 (La. 2001).

VIII. CONSIDERATION OF MITIGATING AND AGGRAVATING FACTORS

The Committee must next look at whether aggravating or mitigating circumstances exist in this matter before imposing discipline. See Supreme Court Rule XIX, §10C(4). The Committee finds the following aggravating factors to exist under the ABA Standards Section 9.22:

(b) dishonest or selfish motives;

(c) a pattern of misconduct;

(d) multiple offenses;

(g) refusal to acknowledge wrongful nature of conduct; and

(i) substantial experience in the practice of law.

Additionally, in the case of Mr. Mann: (a) prior disciplinary offenses.

The Committee finds the following mitigating factors to exist under ABA Standards Section 9.32:

(g) character or reputation; and

in the case of Mr. Laudumiey: (a) absence of a prior disciplinary record.

IX. RECOMMENDATION

Considering all of the foregoing, this Committee recommends that Respondents, Fernand L. Laudumiey, III and Dennis S. Mann, be permanently disbarred from the practice of law.

This opinion by the Committee is unanimous and has been reviewed by each Committee member and all fully concur and further authorize the Chairman, Jack A. Grant, to sign on behalf of all members.

Gretna, Louisiana, this 11th day of April, 2002.

HEARING COMMITTEE NO. 11

/s/ Jack A Grant, Chair
JACK A. GRANT, CHAIR

/s/ Dr. Charles E. Moan / JAG
DR. CHARLES E. MOAN

/s/ Clarence Roby, Jr. / JAG
CLARENCE ROBY, JR.

APPENDIX D

[September 14, 2001]

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: FERNAND L. LAUDUMIEY, III
(BAR ROLL NO. 08126)

DOCKET NUMBER: 01-DB-077

DECLINATORY AND PEREMPTORY EXCEPTIONS
AND ANSWER TO
THE ORIGINAL FORMAL CHARGES
AND
ANSWER TO THE FIRST SUPPLEMENTAL
AND AMENDED CHARGE

NOW INTO THESE PROCEEDINGS comes FERNAND L. LAUDUMIEY, III (Bar Roll No. 08126) for the purpose of excepting to the proceedings herein by the declinatory and peremptory exceptions on constitutional grounds and for the further purpose of answering the formal charges and the first supplemental and amending formal charges and asserting mitigating circumstances. Exceptor and Repondent, with respect, shows:

DECLINATORY EXCEPTIONS
CONSTITUTIONAL LACK OF COMPETENCY

I.

The Louisiana Disciplinary Board lacks subject matter jurisdiction of the charges herein. The Constitution, Art-

icle V (B) vests exclusive original jurisdiction in the Supreme Court of disciplinary proceedings against a member of the Bar.

II.

Vesting power in the Disciplinary Board by Supreme Court rule violates the constitutional limitation to the effect that a delegated power cannot be delegated to an agent.

III.

De novo review in the Supreme Court of the work of the hearing committees and of the Disciplinary Board does not satisfy the requirement delegated by the people to the Supreme Court of exclusive original jurisdiction in the Supreme Court. The people did not delegate to the Supreme Court authority to further delegate responsibility with respect to proceedings against attorneys.

IV.

These proceedings violate Article I, section 22 of the Louisiana Constitution relative to access to courts. Respondent is entitled to a trial of these issues only by a court vested with judicial power. Pursuant to the Constitution, the only court vested with judicial power to hear these proceedings is the Supreme Court. The delegation to the Louisiana Disciplinary Board denies Respondent's access to court.

V.

Proceedings under Rule XIX of the Supreme Court are adjudicative proceedings of a criminal nature with the

initial determinations made by hearing committees composed of lawyers and a layman none of whom are elected judges. The findings of the hearing committees are further adjudicative in that review is by an adjudicative committee which is required to review Findings of Fact and Conclusions of Law and Recommendations of hearing committees and prepare and forward to the Court its findings and recommendations together with the record of a proceeding. These are clearly adjudicative matters. Hearing committees submit to the Board written Findings of Fact and Conclusions of Law and Recommendations. These are all adjudicative functions. Adjudicative functions can be performed only by elected judges and thus Rule XIX violates Louisiana Constitution Article V, Sections 1 and 22. *State of Louisiana v. Robert J. O'Reilly*, No. 00-KA-2864 and in the matter of *State v. Louisiana vs. Scott Brewster*, No. 00-KA 2865 which was decided May 15, 2001 are specifically pleaded herein.

PEREMPTORY EXCEPTION
BASED UPON CONSTITUTIONAL GROUNDS

I.

The proceedings herein are a quasi-criminal proceedings and Exceptor is entitled to all rights to due process of law as protected by both State and Federal Constitutions as well as all other rights accorded criminal defendants in criminal prosecutions.

II.

The proceedings herein violate the principle of separation of powers and checks and balances. Prosecution and adjudication occur wholly within the judicial department.

Criminal prosecution in the American constitutional system is instituted and advanced within the Executive Department. To the Judiciary is left the function of judgment. This separation of powers with its inherent check on power is a constitutional protection accorded the citizen not present in this case.

III.

The proceedings violate Exceptor's rights to due process of law protected under the Louisiana Constitution, Article I, Section 2, and Amendment XIV of the U.S. Constitution in that:

(A) The proceedings herein combine the adjudicative and prosecutorial functions in one agency and one agency to whom authority has been delegated and the intended erection of a "Chinese Wall" between the prosecutor and the adjudicator does not satisfy requirements of due process of laws.

(B) The rule requires a standard of proof which is established as "clear and convincing evidence" and this standard is vague and indefinite and ill-defined and therefore unconstitutional. The proper constitutional standard is "beyond a reasonable doubt."

(C) The standard against which conduct must be measured: "moral fitness to practice law" or "fitness to practice law" is vague and indefinite and therefore unconstitutional.

(D) The definition of what is and what is not "a serious crime" is vague and indefinite and therefore unconstitutional.

IV.

The rules of professional conduct and the penalties provided for violation of the various rules are facially unconstitutional and deprive Exceptor of that constitutional requirement in criminal statutes that the proscribed conduct and the penalty for engaging in the proscribed conduct must be linked and specified in the same rule, statute or regulation. The penalty is ultimately a discretionary one with the Court. Due process of law requires statutory linking of specific wrongful conduct and specific penalties as is done in a criminal code.

V.

Disciplinary counsel in the Supplemental Charge seeks an increase in the potential penalty to permanent disbarment. The wrongful conduct complained of occurred in June of 2000 with conviction in March of 2001. The Supreme Court amended Rule XIX effective August 1, 2001 providing for possible permanent disbarment. At the time of the wrongful conduct of Respondent, the Rule did not provide for possible permanent disbarment. To sanction Respondent with permanent disbarment when such a penalty did not exist at the time of the wrongful conduct constitutes a violation of *ex post facto* principles and due process of law as protected by both the Louisiana and Federal constitutions.

ANSWER TO THE FORMAL CHARGES

COUNT I.

1. Respondent admits his admission to the Louisiana State Bar Association.

2. Respondent denies that he along with others agreed to hire two legal assistants for the purpose of establishing

a "runner based solicitation, personal injury law practice" in the City of New Orleans. Respondent calls for strict proof.

3. Respondent admits participation in the hiring of Aiavolasiti and Michael Palmisano as "legal assistants" and admits setting up a second law office location on Canal Street. Respondent denies this office was intended to conduct a "runner based solicitation, personal injury practice."

4. Respondent denies providing funding to legal assistants for the purpose of making cash payments to "runners", that is payments to individuals for the purpose of locating and bringing personal injury victims to respondent's law office.

5. Respondent admits not knowing that Aiavolasiti and Palmisano were cooperating with federal athorities in a federal grand jury investigation. Respondent was advised by Aiavolasiti and Palmisano that they were required to appear before a grand jury.

6. Respondent admits that he with another met with Aiavolasiti and Palmisano on or about June 15, 2000. The purpose of the meeting was to assure that Aiavolasiti and Palmisano told the truth as to events. Respondent was concerned that Aiavolasiti and Palmisano might not tell the truth to the grand jury in order to protect themselves inasmuch as Respondent had been advised that Aiavolasiti and Palmisano were targets of a grand jury investigation. Respondent feared that Aiavolasiti and Palmisano would not tell the truth and would implicate Respondent so as to secure a reduced sentence from the federal authority.

7. Respondent admits that Aiavolasiti and Palmisano were wearing recording devices and that prior to any subsequent discussions, Aiavolasiti and Palmisano as well as Respondent assured each other that no one was wearing a recording device. Aiavolasiti and Palmisano assured Respondent that they were not wearing a recording device when in fact they were and by their activities lulled Respondent and another into a belief that they were seeking help from Respondent and another.

8. Respondent denies intentionally or negligently attempting to have "legal assistants" provide false and/or misleading information to a federal grand jury including testimony as to Respondent's knowledge and participation in a "runner based solicitation, personal injury practice scheme".

9. Respondent admits that on or about January 18, 2001, the United States Attorney for the Eastern District of Louisiana filed a grand jury indictment against Respondent charging a violation of 18 USC Section 1512(b)(1) and (2).

10. Respondent admits that on or about March 14, 2001, Respondent entered a guilty plea to the single felony count of obstruction of justice and Respondent admits that on May 23, 2001 he was sentenced as reflected in the formal charges.

11. Respondent admits that on April 11, 2001, Respondent was suspended from the practice of law pursuant however to a joint motion for interim suspension.

12. Respondent admits professional misconduct by conviction of a serious crime, however, Respondent avers that the discipline herein should not take the form of disbarment for all of the reasons hereafter specified.

ANSWER TO FIRST SUPPLEMENTAL AND AMENDING FORMAL CHARGE

1. Respondent admits that his conviction of obstructing of justice constitutes a violation of Rule 8.4(b) of the Rules of Professional Conduct.

2. Respondent avers that his offense herein does not warrant permanent disbarment from the practice of law.

3. Respondent further answers that the penalty of permanent disbarment was instituted subsequent to the commission of the offense forming the basis of the charge herein and that any increased penalty sought constitutes retroactive application of penalty provision and as such constitutes an *ex post facto* law in violation of both the Louisiana and United States constitutions.

4. Respondent admits that according to the First Supplemental and Amending Charge, Respondent's criminal conviction in Federal Court which occurred on March 14, 2001, which consisted of obstruction of justice, forms the basis of the proceedings herein.

5. And for further answer, Respondent avers that the proper penalty under all of the relevant facts and circumstances should be suspension for a period of years.

MATTERS IN MITIGATION

I.

Respondent was never involved in any "runner based operation" and Respondent's obstruction of justice was motivated by fear that Aiavolasiti and Palmisano would not tell the truth to the Grand Jury.

a. Messrs. Aiavolasiti and Palmisano came to Respondent seeking employment as legal assistants during 1996. Messrs. Aiavolasiti and Palmisano were instructed by Respondent that no "runner activity" would be tolerated.

b. Messrs. Aiavolasiti and Palmisano engaged in such activities for their personal benefit while utilizing Respondent's law practice as a cover;

c. Messrs. Aiavolasiti and Palmisano were employed as legal assistants in 1996 and when Respondent discovered what type of activity they were engaged in, Respondent shut down the entire operation immediately in June 1997;

d. Respondent never filed fictitious law suits, never paid money to runners, never utilized runners, never utilized tow truck operators, never utilized doctors or received income from doctors;

e. Audits of Respondent's business by federal officials show no financial involvement in runner type operations by Respondent;

f. Respondent employed an associate lawyer to supervise the work of Aiavolasiti and Palmisano;

g. Aiavolasiti and Palmisano seeking help from Respondent because of their prospective questioning before the grand jury revealed in conversations with Respondent their activities and Respondent was concerned that Aiavolasiti and Palmisano would not tell the truth to the grand jury of the lack of Respondent involvement in any runner operation, that Respondent sought to impress upon Aiavolasiti and Palmisano the lack of Respondent's involvement in any runner operation;

h. Respondent did not act intentionally in seeking to obstruct justice. Respondent sought to have Aiavolasiti and Palmisano indicate the non-involvement in any runner operation which was in truth the fact. Respondent was not acting out of dishonest or selfish motive but was seeking to have Aiavolasiti and Palmisano tell the truth to the effect that they were the parties involved in any running of cases. Respondent was concerned that Aiavolasiti and Palmisano would wrongfully involve him in a "runner based operation." Aiavolasiti and Palmisano were motivated to involve Respondent in order to have their sentences reduced in the event they were charged with crime. Aiavolasiti and Palmisano have plead guilty to a federal crime and/or crimes;

i. Respondent at all times maintained a laywer in the operations wherein Aiavolasiti and Palmisano were involved in order that Aiavolasiti and Palmisano not be involved in the practice of law;

j. Respondent cooperated fully with federal authorities and entered an appropriate plea;

k. After cooperation with the federal authorities and upon entering a federal plea, Respondent jointly participated in his suspension from the practice of law;

l. Respondent cooperated with Disciplinary Counsel with an effort to work out consent discipline;

m. The obstruction of justice issue occurred in June of 2000 and the events of alleged runner involvement occurred during 1996 and 1997 when Respondent ended the employment of Aiavolasiti and Palmisano upon learning of their activities which Respondent knew to be improper.

n. Respondent has great remorse for the events which happened; Respondent did not participate in the wrongful activities of Messrs. Aiavolasiti and Palmisano and terminated them as soon as they were revealed.

II.

At the time the obstruction of justice occurred herein, Respondent was seeing a professional for alcohol abuse and was attempting to recover from such malady.

III.

Respondent has no prior disciplinary record.

INCORPORATED DEFENSES

Respondent and Exceptor incorporates as special defenses at all stages of these proceedings the constitutional defenses set forth herein as Declinatory and Peremptory Exceptions.

Respectfully submitted,

/s/ William A. Porteous, III
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[Certificate of Service Omitted In Printing]

APPENDIX E

EXCERPTS FROM BRIEF BEFORE LOUISIANA ATTORNEY DISCIPLINARY BOARD RAISING CONSTITUTIONAL ISSUES OF DUE PROCESS AND *EX POST FACTO*

[June 19, 2002]

LOUISIANA ATTORNEY DISCIPLINARY BOARD

IN RE: FERNAND L. LAUDUMIEY, III
DOCKET NO. 01-DB-077

Consolidated with

IN RE: DENNIS S. MANN
DOCKET NUMBER: 01-DB-078

PRE-HEARING MEMORANDUM OF FERNAND L. LAUDUMIEY, III AND DENNIS S. MANN IN CONNECTION WITH PROCEEDINGS BEFORE THE LOUISIANA ATTORNEY DISCIPLINARY BOARD RAISING ISSUES OF THE ADEQUACY OF THE RECORD TO SUPPORT THE HARSHNESS OF THE PENALTY RECOMMENDED AND CONSTITUTIONAL ISSUES

* * *

E. Adjudicative and Prosecutorial Functions in Same Arm of Government.

Proceedings under Rule XIX are adjudicative procedures of a criminal nature and initial determinations by Hearing Committees composed of lawyers and layman, none of whom are elected judges, violate the right of Respondents to adjudicative proceedings in a court. The Hearing Committees and the Disciplinary Boards have been constituted as though they were administrative agency without the protection with respect to due process considerations which have been evolved through the Federal Administrative Procedure Act and the Louisiana Administrative Procedure Act. The Disciplinary Board routinely conceives of itself as reviewing facts and conclusions of law and recommendations of Hearing Committees just as though they were an intermediate court. The Disciplinary Board functions as an adjudicative body. Both they and the Hearing Committees are adjudicative and submit findings of fact and conclusions of law and recommendations. Adjudicative functions can be performed only by elected judges and thus Rule XIX violates Louisiana Constitution Article V(1) and (22).

These proceedings are quasi criminal proceedings and Respondents are entitled to all rights to due process of law as protected by both State and Federal Constitutions as well as all other rights accorded criminal defendants in criminal prosecutions.

F. Due Process and Separation of Powers as A Check on Governmental Power.

Inherent protections in the concept of due process of law and separations of powers are denied Respondents herein. Prosecution and adjudication occurs wholly

within the judicial department of government. Criminal prosecution in the American constitutional system is instituted and advanced within the executive department. To the judiciary is left the function of judgment. This separation of powers with its inherent check on power is a constitutional protection accorded the citizen absent in this case inasmuch as the entire proceedings are within the judiciary department. Historically, these issues were raised when administrative agencies began to perform adjudicative functions and in order to protect the due process rights of parties appearing before such agencies, Congress and the Legislature enacted various administrative procedure acts, none of which are applicable in this cause and the Supreme Court has not adopted rules whereby the due process rights of lawyers are protected in the adjudicative process before the Hearing committees and the Disciplinary Board. The intended erection of a Chinese wall between the prosecutor and the adjudicator does not satisfy requirements of due process of law. Due process further requires in these cases proof beyond a reasonable doubt and not by clear and convincing evidence alone. The standard against which conduct is measured "moral fitness to practice law" or "fitness to practice law" is vague and indefinite and unconstitutional. Likewise, what is conviction of a serious crime is vague and indefinite and unconstitutional.

* * *

H. Permanent Disbarment for Offenses Before August 1, 2001 Violates the *Ex Post Facto* Prohibition and Due Process Requirement.

The penalty assessed herein by the Hearing Committee of permanent disbarment pursuant to Supreme Court Amended Rule XIX effective August 1, 2001 providing

for possible permanent disbarment, constitutes a violation of *ex post facto* principals and due process of law as protected by both the Louisiana and Federal Constitutions. The wrongful conduct of Respondents occurred prior to August 1, 2001, the date when the Rule became effective. The Supreme Court rules are generally considered to be prospective in application and in this case they were not specified to be of retroactive application.

In support of the constitutional positions herein and for the purpose of preserving same, Respondents attach hereto the Declinatory and Peremptory Exceptions filed in these proceedings by Respondents, (Attachment A), a Memorandum on Constitutional Issues including Allowance of Hearsay Evidence in No. 01-DB-42 In re: Henry J. Lafont, Jr. which memorandum addresses constitutional jurisdictional issues, delegation of power, the rights of lawyers to due process of law, the requirement of an impartial tribunal outside of the same department of government, the issue of vagueness and indefiniteness of terms, the rights of lawyers to due process, the requirement that legal matters be determined by a judge and that the appropriate standard of proof is "beyond a reasonable doubt." (Attachment B).

Respondents also enclose the original Brief which they filed as amicus curaie in the Supreme Court in No. 98-B-0772 *In re: Jessie N. Gross,* addressing *ex post facto* and due processing issues relative to the application of the permanent disbarment rule to offenses occurring before effective date. (Attachment C). For informational purposes, Respondents, attach the decision of the Supreme Court in the matter of *In re: Jessie N. Gross* dated March 15, 2002, not passing upon the issue and holding that in the context of the *Jessie N. Gross* case

and its present facts, the Court need not resolve the issue of retroactivity of the permanent disbarment rules. (Attachment D).

* * *

APPENDIX F

EXCERPTS FROM OBJECTIONS OF PETITIONERS TO REPORT OF LOUISIANA ATTORNEY DISCIPLINARY BOARD RAISING CONSTITUTIONAL ISSUES

[February 11, 2003]

SUPREME COURT
STATE OF LOUISIANA

RE: FERNAND L. LAUDUMIEY, III and
IN RE: DENNIS S. MANN, Disciplinary Proceedings

SUPREME COURT DOCKET NO. 2003-B-0234

DISCIPLINARY BOARD DOCKET NOS. 01-DB-077
Consolidated with
DOCKET NUMBER 01-DB-078

OBJECTIONS OF FERNAND L. LAUDUMIEY, III
and DENNIS S. MANN TO
REPORT AND RECOMMENDATIONS TO
THE SUPREME COURT FROM THE
LOUISIANA ATTORNEY DISCIPLINARY BOARD

* * *

III.

Constitutional Limitations.

Respondents represent that the power of this court and of court's generally is plenary with respect to who may appear as counsel at the Bar; however, that power is circumscribed by the citizen's and lawyers' right to freedom from *ex post facto* laws and to due process meaning notice and an opportunity to be heard under a system with the substantive and the real appearance of fairness.

A. *Ex Post Facto* Rule

The imposition of the penalty of permanent disbarment violates Respondents' constitutional rights in that no law may impose penalties *ex post facto.* Respondents' offenses occurred at a time that the rule relative to permanent disbarment was not formulated and the most severe form of penalty was five years disbarment with an option on the part of the wrongdoer to reapply for admission to the Bar at the end of five-years with the court retaining authority of whether or not to admit. Permanent disbarment forecloses that option and the Board and Hearing Committee have recommended a penalty which did not exist at the time of Respondents' wrongful conduct or at the time of the institution of the proceedings against Respondents. Respondents participated as *amicus curiae* in the matters of *In re: Jessie N. Gros, III,* No. 98-B-0772; *In re: Robert E. Patrick,* No. 01-B-1419 and *In re: Leonard O. Parker,* No. 00-B 3522, and which were argued in January, 2002, and in which the court declined to address the constitutional *ex post facto* issue in those cases. Respondents aver that to impose permanent disbarment on them is to violate the Louisiana and federal constitutional prohibition against *ex post facto* laws.

* * *

E. Constitutional Prohibition of Adjudicative and Prosecutorial Functions in the Same Arm of Government, Due Process and Fairness.

Constitutional due process of law as required by both the Louisiana and federal constitutions, requires notice and an opportunity to be heard before a fair and impartial tribunal. Proceedings under Supreme Court Rule 19 are adjudicative proceedings and they are criminal or quasi criminal in nature. Initial determination by hearing committees composed of lawyers and layman, none of whom are constitutionally elected judges, violate the rights of Respondents to adjudicative proceedings in court. The hearing committees and the Disciplinary Board have been constituted as though they were administrative agencies within the judiciary. The system implemented by Rule 19 fails to provide the constitutional protection with respect to due process of law that has brought into being the Federal Administrative Procedure Act and the Louisiana Administrative Procedure Act. Disciplinary counsel, the hearing committees and the Disciplinary Board perform prosecutorial and adjudicative functions and the board considers itself an intermediate appellate court. Disciplinary Counsel and Board Members are beholden to the Supreme Court for their appointments. There is not the independence of officers that the constitution requires.

Only elected judges may exercise a judicial function under the Louisiana constitution and constitutional safeguards as required by fairness as understood as due process of law requires separation of adjudicative and prosecutorial functions as has been done through the Federal Administrative Procedure Act and the Louisiana Administrative Procedure Act. The inherent protection relative to fairness in the concepts of due process of law

and separation of powers is absent in Rule 19, which violates those considerations inasmuch as prosecution and adjudication occur wholly within the judicial department of government with the court in potential control of the entire prosecutorial and adjudicative process. Structurally, the Rule 19 system is constitutionally flawed. The judiciary is to perform the function of judgment and not that of prosecution.

F. Before A Lawyer's License May be Revoked, Proof Beyond A Reasonable Doubt Should Be Required Since They Are Quasi Criminal Proceedings; Due Process Requires No Less.

Further, since the proceedings whereby a professional's license may be revoked, and in this case permanently revoked, are criminal or quasi criminal, and due process requires proof beyond a reasonable doubt and not merely clear and convincing evidence or vague standards such as "moral fitness to practice law" or "fitness to practice law".

* * *

APPENDIX G

EXCERPTS FROM BRIEF BEFORE SUPREME COURT OF LOUISIANA SHOWING RAISING OF CONSTITUTIONAL ISSUES

[April 11, 2003]

SUPREME COURT
STATE OF LOUISIANA

RE: FERNAND L. LAUDUMIEY, III and
IN RE: DENNIS S. MANN, Disciplinary Proceedings

SUPREME COURT DOCKET NO. 2003-B-0234

DISCIPLINARY BOARD DOCKET NOS. 01-DB-077
Consolidated with
DOCKET NUMBER: 01-DB-078

ORIGINAL BRIEF IN SUPPORT OF
OBJECTIONS OF FERDNAND L. LAUDUMIEY, III
and DENNIS S. MANN
TO REPORT AND RECOMMENDATIONS TO
THE SUPREME COURT FROM THE
LOUISIANA ATTORNEY DISCIPLINARY BOARD

* * *

PART I

THE SANCTION OF PERMANENT DISBARMENT UNDER SUPREME COURT RULE XIX, §10 AND §24 (AS AMENDED EFFECTIVE AUGUST 1, 2001) SHOULD NOT BE IMPOSED IN CASES INVOLVING LAWYER MISCONDUCT OCCURRING PRIOR TO AUGUST 1, 2001.

THE APPLICATION OF SUPREME COURT RULE XIX, §10 AND §24 (AS AMENDED EFFECTIVE AUGUST 1, 2001) WHEN APPLIED TO LAWYER MISCONDUCT OCCURRING PRIOR TO AUGUST 1, 2001 VIOLATES CONSTITUTIONAL *EX POST FACTO* PROHIBITIONS AND DUE PROCESS RIGHTS.

THE AMENDMENT VIOLATES CIVIL CODE ARTICLE 6 RELATIVE TO PROSPECTIVE APPLICATION OF LAWS OF SUBSTANCE.

Disciplinary proceedings were commenced against Messrs Laudumiey and Mann before August 1, 2001. Disciplinary Counsel in a supplemental pleading sought permanent disbarment for alleged lawyer misconduct occurring prior to August 1, 2001.

Prior to August 1, 2001, the sanction of disbarment meant that a disbarred lawyer had the option of applying for readmission to the Bar after five years. The August 1, 2001 amendment applies to egregious cases with examples being given and takes away the option of the disbarred lawyer seeking readmission after five years. Messrs. Mann and Laudumiey believe this is a potential increase in the punishment of a lawyer offender; it is a new penalty. Respondents aver that the imposition of permanent disbarment in cases where the wrongful and offensive conduct occurred prior to the effective date of August 1, 2001, is a violation of the prohibiton against *ex post facto* laws and the general principle that laws of substance are not to be applied retroactively.

The distinguishing feature of the amended rule is that it increases the punishment by taking away the option that the offender has of applying for readmission. The issue is like that wherein the penalties in a criminal statute are increased between the time of an offense and the imposition of sentence. The offender must be sentenced in that instance under the old sentencing law. Whatever tends to increase punishment constitutes a substantive penalty increase. The matter is analogous to a prisoner who seeks discretionary commutation or parole and while serving his penalty, commutation or parole rules are changed and harshened and the prisoner is deprived of the option of seeking parole or commutation. Such statutes violate constitutional protections relative to *ex post facto* laws. Both the Louisiana constitution and the federal constitution prohibit *ex post facto* laws. Louisiana Constitution Article I, Sec. 23 prohibits *ex post facto* laws and United States Constitution, Article I, Section 10, prohibits the states from enacting *ex post facto* laws.

The possible retroactive application of Supreme Court Rule XIX, §10 and §24, also raises due process questions. To change the penalty aspect of the charge after the alleged offense is to violate due process rights in contravention of *In Re: Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). Further, as a matter of due process of law, there is violation of the "the fair warning" requirement which offends a principle of justice so rooted in the traditions and conscience of our people as to be ranked as "fundamental." *Snyder v. Massachusetts,* 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934). The proscription of laws that do not give a "fair warning" is "implicit in the concept of ordered liberty." *Palko v. Connecticut,* 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). The requirement

of "a fair warning" and the prohibition of *ex post facto* laws is a matter which should be incorporated into and absorbed into the concept of due process of law as required by Amendment 14 of the United States Constitution and Article I, Sec. 2 of the Constitution of Louisiana.

A. Because Lawyer Disciplinary Proceedings Are Quasi Criminal They Cannot Increase Punishment *Ex Post Facto.*

"Fair Warning" is the basis of the American commitment to the *ex post facto* prohibition. *Dobbert v. Florida,* 432 U.S. 282, 297-98, 97 S.Ct. 2290, 2300-01, 53 L.Ed.2d 344 (1977). The commitment to a "fair warning" is rooted in Western and American political and legal thought, Story, *Commentaries on the Constitution of the United States,* Section 1367 (1833). Retroactivity was condemned by the *Corpus Juris* of Justinium and the canon law and is the root of the phrase "*Nulla Poena Sine Lege*", Schwartz, *Commentaries on the Constitution of the United States,* Part III, Rights of the Person, Chapter 151, Section 392 (1968). Schwartz cites Radin, *Handbook of Roman Law,* 475 (1927), and 1 Blackstone, *Commentaries on the Law of England,* 46 (1765). Blackstone declares: "[W]hen *after* an action is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it, here it is impossible that the party could foresee that an action innocent when it was done should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be, therefore, made to commence *in futuro,* and be notified before there commencement." The necessity of publishing the laws in order that they be known and a party therefore fore-

warned, is inherent in civilian thinking. *Civil Code of 1870, Articles 6, 7 and 8* which are also found in the *Louisiana Civil Code of 1825, the Code of 1808 and the Code Napoleon.*

In *Federalist Papers, No. 44,* Madison declares that *ex post facto* laws "are contrary to the first principles of the social compact and every principle of sound legislation." He declares that the prohibition is part of the "spirit" and scope of our "fundamental charters." Prohibition of *ex post facto* laws was needed to erect "additional fences" against "dangers." Madison describes these fences as part of a constitutional barrier in favor of personal security and private rights. *Calder v. Bull,* 3 Dall (U.S. 386, 390, 1 L.Ed. 648 (1798), declared that *ex post facto* laws included laws which aggravated a crime and made it greater than it was when committed or changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed.

Afterwards, in *Fletcher v. Peck,* 10 U.S. 87, 6 Cranch 48, 3 L.Ed. 162 (1810), it was held that *ex post facto* laws included those laws which rendered an act punishable in a manner in which it was not punishable when committed. 6 Cranch (U.S.) 48. See also, 1 Kent, *Commentaries on American Law,* 382 (1826). It can be seen from this thinking that the prohibition extends to not only making criminal, conduct which at the time it was conducted was not punishable, but to the increasing of punishment after the commission of the crime.

Lawyer disciplinary proceedings are quasi criminal. *In re: Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 1226, 20 L.Ed.2d 117 (1968); *Application of Gault,* 387 U.S. 1, 33, 87 S.Ct. 1428, 1446, 18 L.Ed.2d 527 (1967). *U.S. v. Brown,* 72 F.3rd 25, 29 (5th Cir. 1995); *Matter of Thal-*

heim, 853 F.2d 383, 388 (5th Cir. 1998). *Louisiana Constitution* Article I, Sec. 23 provides: "No . . . *ex post facto* law . . . shall be enacted." The protection against the application of *ex post facto* laws is a right of the citizen forming part of Louisiana's Declaration of Rights. The Constitution of the United States in Article I, Sec. 10 provides that: "No State shall . . . pass any . . . *ex post facto* Law . . . .".

This court has many times set forth the rule that lawyer disciplinary proceedings are primarily for the protection of the public. However, this court has always indicated that, in part, punishment of the defaulting lawyer is involved. *In re: Vaughan,* 2000-1892 (La. 10/27/00), 772 So.2d 87; *In re: Taylor,* 2000-2392 (La. 10/13/00), 770 So.2d 335; *In re: Estiverne,* 99-0949 (La. 9/24/99), 741 So.2d 649; *In re: Ashy,* 98-0662 (La. 12/1/98), 721 So.2d 859. While punishment may not be the only objective of disciplinary proceedings, those proceedings involve punishment.

All criminal laws exist for the protection of the public and part of the protection for the public is punishment of the offender.

This court described the practical application of *ex post facto* thinking in *State v. Loyd,* 96-1805 (La. 2/13/97), 689 So.2d 1321, 1326: "The suspect legislation: (1) must be passed after the date of the offense, (2) must relate to the offense or its punishment, and (3) must alter the situation of the accused to his disadvantage." *State ex rel. Glover v. State,* 93-2330, 94-2101, 94-2197 (La. 9/5/95), 660 So.2d 1189, 1200. In this case, the amendment to Rule XIX was passed after the date Respondent's offense, it relates to the offense or its punishment, and it alters the situation of the accused to his disadvantage. Possibly, the disbarred

lawyer may never be able to apply for readmission. See also, *State v. Jordan,* 440 So.2d 716, 718 (La. 1983) rehearing denied (1987); *Weaver v. Graham,* 450 U.S. 24, 29, 101 S.Ct. 960, 964, 67 L.Ed.2d 17 (1981). *Johnson v. United States,* 529 U.S. 694, 120 S.Ct. 1795, 1801, 146 L.Ed.2d 727 (2000) involved an *ex post facto* challenge to a federal statute which authorized a district court to impose an additional term of supervised release upon violation of the initial release conditions. The Court noted that the *ex post facto* law question is whether a party is made worse off by the application of the new law. In this case, it is clear that a Respondent who loses the option of applying for readmission is "worse off". Respondents could be "worse off" even though their conduct occurred prior to August 1, 2001.

Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 896-98, 137 L.Ed.2d 63 (1997) involved a post conviction Florida statute which cancelled a prisoner's release credits which had been awarded to alleviate prison overcrowding. The Court held that this violated the *ex post facto* prohibition because it "must disadvantage the offender affected by it." *Id* at 896, citing *Weaver v. Graham,* 450 U.S. 24 at 29, 101 S.Ct. 960 at 964. Indeed, the Court relies upon the fundamental case of *Calder v. Bull,* 3 Dall (U.S.) 386, 390, 1 L.Ed. 648 (1798).

The right of a disbarred lawyer to seek readmission after five years is analogous to a prisoner seeking parole after serving a portion of his sentence. Changing the right to seek parole after serving a portion of the sentence offends *ex post facto* precepts. The prisoner is entitled to the benefit of the parole statute in effect at the time of his offense where parole is discretionary. *State v. Bullock,* 269 So.2d 824, 826 (La. 1972); *State*

ex rel. Woodward v. Board of Parole, 155 La. 689, 703-04, 99 So. 534 (La. 1924). In this case, Respondent, like the prisoner seeking parole, could come to the court after five years and seek readmission and the court in its discretion might grant or deny the readmission application.

Messrs. Mann and Laudumiey are no different than the prisoners in *Bullock,* supra, and *Woodward,* supra.

No doubt but that the Respondents as a result of the change in the punishment have been disadvantaged. If the new rule is applied to the Respondents, the Respondents might never be able to apply for readmission although his wrong occurred at a time when the rule permitted application for readmission after five years.

* * *

C. Procedural Due Process of Law Is Infringed By The Application of The Amended Rule XIX, § 10 and § 24 To The Case of Respondents.

Fundamental fairness protections afforded by due process apply to lawyer disciplinary proceedings. These protections include the right to adequate notice of the charges against the lawyer so that he has a fair opportunity to defend himself. *In re: Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The U.S. Supreme Court in *Ruffalo* stated:

> Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. He is accordingly entitled to procedural due process, which includes fair notice of the charge. 390 U.S. at 550.

In *Ruffalo,* the Respondent was not provided with notice of the charge which led to his disbarment until after he and another witness had already testified at the

disciplinary hearing. The Supreme Court found that this constituted a procedural due process violation.

If the sanction of permanent disbarment is applied retroactively, the Respondents are deprived of due process in that they did not have adequate notice of this potential sanction at the time of their alleged offense.

The U.S. Supreme Court in *Ruffalo* held:

> [Lawyer disciplinary proceedings] are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> . . .
>
> This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process. 390 U.S. at 551 [Citation omitted.]

Similarly, if the Respondents had notice at the time they obstructed justice that the penalty might be disbarment without the option to reapply after five years, they might not have committed the offense. Decisions cannot later be undone; they are an inescapable part of an established record..

Therefore, as a result of procedural due process considerations, the sanction of permanent disbarment should only be applied prospectively.

D. Fundamental Fairness In A Procedure Involving Liberty and Property Is Incorporated Within The Concept Of Due Process of Law as Understood In This Nation.

Louisiana, through its Declaration of Rights, Article I, Sec. 2, and the United States through Article V and Amendment XIV of the Constitution of the United States are committed to requiring due process. Where a government not only terminates present employment but forecloses an entire occupational field, that action must comport with due process of law and equal protection of the laws. A citizen of this nation has a liberty and property interest in following a trade or occupation. *Conn v. Gabbert,* 526 U.S. 286, 291-92, 119 S.Ct. 1292, 1295-96, 143 L.Ed.2d 399 (1999); *Application of Griffiths,* 413 U.S. 717, 722-27, 93 S.Ct. 2851, 2855-58, 37 L.Ed.2d 910 (1973); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 2706-07, 33 L.Ed.2d 548 (1972); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957): *Meyer v. Nebraska,* 262 U.S. 390, 399; 43 S.Ct. 625, 626-27, 67 L.Ed. 1042 (1923); *Ulichny v. Merton Community School District,* 249 F.3d 686, 704-05 (7th Cir. 2001); *Llamas v. Butte Community College District,* 238 F.3d 1123, 1128 (9th Cir. 2001); *Pleva v. Norquist,* 195 F.3d 905, 915-16 (7th Cir. 1999); *Draghi v. County of Cook,* 184 F.3d 689 (7th Cir. 1999); *Martin v. Memorial Hospital at Gulf Port,* 130 F.3d 1143 (5th Cir. 1997); *Gonzalez v. City of New York,* 135 F. Supp. 2d 385, 393 (E.D.N.Y. 2001).

The Louisiana jurisprudence has consistently required full due process notice in bar disciplinary proceedings. *In re: Quirk,* 97-1143 (La. 12/12/97), 705 So.2d 172, 187. Notice involves notice of the sanction. *Louisiana*

State Bar Association v. Keys, 567 So.2d 588 (La. 1990); *Louisiana State Bar Association v. Boddie*, 534 So.2d 944 (La. 1988); *Louisiana State Bar Association v. McGovern*, 481 So.2d 574 (La. 1986). "Fair warning" is an essential rule in all matters that involve criminal conduct. *Dobbert v. Florida*, 432 U.S. 282, 297-98, 97 S.Ct. 2290, 2300-01, 53 L.Ed.2d 344 (1977).

Justice Cardozo thought that "the Fourteenth Amendment proscribed certain state procedures, not because proscription was spelled out in one of the Bill of Rights but because the matter offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Indeed, the idea is "implicit in the concept of ordered 'liberty' ". *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937). Justice Harlan considered freedom of association for the advancement of beliefs to be "an inseparable aspect of 'liberty' assured by the due process clause of the Fourteenth Amendment. . ." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Incorporation of fundamental ideas implicit in the concept of ordered liberty is an ongoing process.

In the law of the Western civilized world where liberty and property are protected, wrongful conduct and the penalty for wrongful conduct are twined in any rule or statute. This exists because of the requirement of a "fair warning". It is part of our concept of "ordered liberty". To denounce conduct and after that conduct has occurred to increase the penalty is to abandon that concept of "ordered liberty" which is fundamental and protected by due process in this nation.

* * *

PART III

THE SYSTEM OF LAWYER DISCIPLINE IS CONSTITUTIONALLY FLAWED BECAUSE OF VIOLATION OF THE "IMPARTIAL TRIBUNAL" AND THE "APPEARANCE AND REALITY OF FAIRNESS" DUE PROCESS REQUIREMENT.

The Supreme Court sits in judgment in these matters. Constitution Article V, Section 5B. Rule 19, Section 2A establishes a unitary entity for the administration of lawyer discipline. The Supreme Court appoints the Disciplinary Board which sits in judgment. Supreme Court Rule 19 Section 2B. The Board appoints hearing committees which sit in judgment. Rule 19, Section 3. The Board appoints Disciplinary Counsel, with the approval of the Supreme Court, Rule 19, Section 4. The Disciplinary Counsel prosecutes. Prosecution and adjudication are tied to the court. This combines prosecution and adjudication in a single department of government in a system without checks and balances or review outside that department. It lacks that appearance of fairness which the citizen is entitled to expect from government.

In a system where the Board and the Prosecutor are linked to the appointive power of the Supreme Court, prosecution and adjudication may reflect the philosophy and prejudices (if any) of a majority of the court. This is an unconstitutional closeness of prosecution and adjudication. The fact that Rule 19 Section 2 states that within the Board, the "Prosecutorial and adjudicative functions are to be separate within the agency insofar as practicable in order to avoid unfairness," does not meet the issue. The issue is the link between this court, the Board and the prosecutor in the merging of the prosecutorial and adjudicative functions.

Counsel is not accusing anyone of unfairness. Rather, the system as conceived is constitutionally flawed because the system does not give the appearance of fairness which a lawyer accused of wrongdoing is entitled to expect. Undersigned counsel has the greatest respect and friendship for the members of the court, the Disciplinary Board and Disciplinary Counsel. The system is the issue.

The attention of the court is also called to *In re: Haggerty,* 257 La. 1, 241 So.2d 469, 472 (La. 1970) where similar contentions were advanced and rejected. In *Haggerty,* the court relied upon *Pangburn v. Civil Aeronautical Board,* 311 F.2d 349, 356 (1st Cir. 1962) and an important point in that case was that there was no reliance by the Board on any determination or findings within the agency. That is not the case here. The Disciplinary Board however to an extent is bound because it is still controlled by the "manifest error" rule of Rule XIX, Section 2 which characterizes the Board's function as being one of "appellate review." To the extent that the Supreme Court considers itself in anyway deferential to lower tribunal findings, that renders the matter distinguishable from the thinking that the combining of investigative, prosecutorial and adjudicative functions in the same agency is permissible. In all of those agency cases, there is review in the courts.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re: Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955). There is a presumption of integrity and honesty. "Our system has always endeavored to prevent the probability of unfairness." *Ibid; Winthrow v. Larkin,* 421 U.S. 35, 95 S.Ct. 1456, 1464. "Justice must satisfy the appearance of justice." *Offut v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

In this case, where the Supreme Court appoints the Board and approves the selection of the prosecutor and clothes the Hearing Committees findings with the clearly erroneous rule and then decides and then there is no check or balance outside of the court, the fit is too close so far as the "fairness" issue is concerned. It must never be forgotten that in the normal administrative agency determination where the prosecutorial and adjudicative functions overlap, there remains the check through an appeal to the courts which are an independent branch of government outside the administrative agency or executive department. Since that outside check is absent, the greater must be the assurance of a system of initial fairness. See also *Goldberg v. Kelly,* 397 U.S. 254, 271, 90 S.Ct. 1011, 1022, *Marshall v. Jerrico,* 446 U.S. 238, 242, 100 S.Ct. 1610, 1613 (1986); *Schweiker v. McClure,* 456 U.S. 188, 195, 102 S.Ct. 1665, 1669 (1982).

PART IV

THE PROCEEDINGS WHEREIN A LAWYER MAY LOOSE THE PRIVILEGE OF PRACTICING LAW ARE QUASI-CRIMINAL AND AN ATTORNEY IS ENTITLED TO FULL DUE PROCESS BOTH PROCEDURAL AND SUBSTANTIVE. THIS PROTECTION REQUIES PROOF BEYOND A REASONABLE DOUBT AND VOIDS STANDARDS SUCH AS "CLEAR AND CONVINCING EVIDENCE," "MORAL FITNESS TO PRACTICE LAW" AND "FITNESS TO PRACTICE LAW." THESE TERMS ARE VAGUE AND VOID; THEY PERMIT THE INTRUSION OF SUBJECTIVE JUDGMENT BY THE FACT FINDER.

The proceedings herein are quasi criminal and Respondents are entitled to the protections of substantive and procedural due process of law protected both in the Louisiana and Federal constitutions. *In re: Ruffalo,* 390 U.S. 544, 5551, 88 S.Ct. 1222, 1226 (1968); *In re:*

Gault, 387 U.S. 1, 33, 87 S.Ct. 1428, 1446 (1967); *U.S. v. Brown,* 72 F.3d 25, 29 (5th Cir. 1995); *Matter of Thalheim,* 853 F.2d 383, 388, (5th Cir. 1998).

The applicable standard by which Respondents should be judged is proof beyond a reasonable doubt inasmuch as these are quasi criminal proceedings. To use any other standard is a denial of due process of law. *In re: Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-1073 (1970). Anything less violates the requirements of due process.

The terms "clear and convincing evidence", "moral fitness to practice law", and "fitness to practice law" are all vague, indefinite and ill-defined. It is a violation of due process of law to permit such terms to guide individuals inasmuch as they are indefinite. The standards are highly subjective and are likely to result in a violation of due process of law by virtue of void for vagueness. *Musser v. Utah,* 333 U.S. 95, 97, 68 S.Ct. 397, 398 (1948); *Cantwell v. Connecticut,* 310 U.S. 296, 308, 60 S.Ct. 900, 905 (1940); *Winters v. New York,* 333 U.S. 507, 515-516, 68 S.Ct. 665, 670-671 (1948); *Colten v. Kentucky,* 407 U.S. 104, 110; 92 S.Ct. 1953, 1957 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839 (1972); *Smith v. Goguen,* 415 U.S. 566, 94 S.Ct. 1242 (1974). The terms are empty vessels that become a vehicle for the fact finder's subjective beliefs and interpretations.

* * *

APPENDIX H

EXCERPTS FROM RULE XIX OF RULES OF SUPREME COURT OF LOUISIANA WITH OFFICIAL LOUISIANA SUPREME COURT COMMENTARY ON CHANGES TO RULE XIX, SECTIONS 10 EFFECTIVE AUGUST 1, 2001 AND APPENDIX E TO RULE XIX

RULE XIX. RULES FOR LAWYER DISCIPLINARY ENFORCEMENT

Section 1. Authority of the Court.

Under the authority of Article V, Section 5(a) and (B) of the Louisiana Constitution of 1974 and the inherent power of this court, it is ordered that Article XV of the Articles of Incorporation of the Louisiana State Bar Association be vacated and repealed, and the following Rules for Lawyer Disciplinary Enforcement be and are hereby adopted.

Section 2. The Attorney Disciplinary Board.

A. Agency. There is hereby established one permanent statewide agency to administer the lawyer discipline and disability system. The agency consists of a statewide board as provided in this Section 2, hearing committees as provided for in Section 3, disciplinary counsel as provided for in Section 4, and staff appointed by the board and counsel. The agency is a unitary entity. While it performs both prosecutorial and adjudicative functions, these functions shall be separated within the agency insofar as practicable in order to avoid unfairness. The prosecutorial functions shall be directed by a lawyer

employed full-time by the agency and performed, insofar as practicable, by employees of the agency. The adjudicative functions shall be performed by practicing lawyers and public members.

B. Appointment. The disciplinary board shall be appointed by the Court and shall consist of thirteen members as of September 1, 1991 and thereafter.

* * *

G. Powers and Duties. The board shall divide itself into two committees: a nine-member adjudicative committee and a five-member administrative committee. The adjudicative committee shall include three public members, and the administrative committee shall include one public member.

(1) *Joint Duties.* The adjudicative and administrative committees shall jointly have the following powers and duties:

(a) To propose rules of procedure for lawyer discipline and disability proceedings for adoption by the court, to adopt internal operating rules which do not conflict with the Rules for Lawyer Disciplinary Enforcement, and to comment on the enforceability of existing and proposed Rules of Professional Conduct;

(b) To appoint, with the approval of this court, a chief disciplinary counsel, hereinafter referred to as "counsel" or "disciplinary counsel", to perform prosecutorial functions;

* * *

(2) *Powers and Duties of Adjudicative Committee.* The adjudicative committee shall have the following powers and duties:

(a) To perform appellate review functions, consisting of review of the findings of fact, conclusions of law and recommendations of hearing committees with respect to formal charges, petitions for transfer to and from disability inactive status, and petitions for reinstatement, and prepare and forward to the court its own findings, if any, and recommendations, together with the record of the proceedings before the hearing committee;

* * *

(3) *Duties of Administrative Committee.* The administrative committee shall have the following powers and duties:

(a) To appoint three or more hearing committees and

* * *

Members of the administrative committee shall not participate in or vote on matters involving appellate review functions of the adjudicative committee.

Section 3. Hearing Committees.

* * *

D. Powers and Duties. Hearing committees shall have the following powers and duties:

(1) To conduct hearings into formal charges of misconduct, petitions for reinstatement or readmission, and petitions for transfer to and from disability inactive status upon assignment;

(2) To submit to the board written findings of fact, conclusions of law, and recommendations, together with the record of the hearing; and

(3) To review dismissals by disciplinary counsel upon a request for review by complainant. The hearing committee may approve, modify, or disapprove the dismissal, or direct that the matter be investigated further. The standard of review for complainant appeals of dismissal is whether disciplinary counsel abused his/her discretion in dismissing the complaint.

Regular lawyer members shall have such additional duties as provided for in Section 2(G)(3)(a)(iii) and 11 (b)(3).

E. Powers and Duties of Hearing Committee Chair. Each hearing committee chair shall have the following powers and duties:

(1) To review recommendations of disciplinary counsel following investigation for disposition of disciplinary matters other than petitions for transfer to and from disability inactive status. The hearing committee chair may approve, modify, or disapprove the recommendations of disciplinary counsel, or direct that the matter be investigated further. If the hearing committee chair modifies or disapproves the recommendation, or directs that the matter be investigated further, disciplinary counsel may appeal that action to the chair of another hearing committee designated by the board who shall approve either disciplinary counsel's recommendation or the action of the first hearing committee chair. The decision of the second hearing committee chair shall be final within the agency.

In reviewing a recommendation of disciplinary counsel to file formal charges, the hearing committee chair shall determine if there is probable cause to believe that a violation or attempted violation of the Rules of Professional Conduct has occurred or that

there are grounds for lawyer discipline pursuant to Section 9.

* * *

Section 4,. Disciplinary Counsel.

A. Appointment. The board shall appoint, with the approval of this court, a lawyer admitted to practice in the state to serve as disciplinary counsel. Neither the chief disciplinary counsel nor full-time staff disciplinary counsel shall engage in private practice.

B. Powers and Duties. Disciplinary counsel shall perform all prosecutorial functions and have the following powers and duties:

(1) To screen all information coming to the attention of the agency to determine whether it concerns a lawyer subject to the jurisdiction of the agency because it relates to misconduct by the lawyer or to the incapacity of the lawyer.

(2) To investigate all information coming to the attention of the agency which, if true, would be grounds for discipline or transfer to disability inactive status and investigate all facts pertaining to petitions for reinstatement or readmission, reserving unto disciplinary counsel the authority and discretion to refer matters before or after investigation to the Practice Assistance and Improvement Program administered by the Louisiana State Bar Association and approved by the Supreme Court.

(3) To dismiss or recommend probation, informal admonition, a stay, the filing of formal charges, or the petitioning for transfer to disability inactive status with respect to each matter brought to the attention of the agency.

(4) To prosecute before hearing committees, the board, and the court discipline, reinstatement and readmission proceedings, and proceedings for transfer to or from disability inactive status.

* * *

Section 10. Sanctions.

A. Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) Disbarment by the court. In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

* * *

Commentary of the Court to accompany Order dated July 19, 2001 amending Rule XIX

In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. The amendments reflect the judgement of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in consideration of the guidelines set forth in Appendix E to the Rules of Lawyer Disciplinary Enforcement. The

amendments are substantially similar to the recommendations of the Office of Disciplinary Counsel and the House of Delegates of the Louisiana State Bar Association.

In adopting these amendments to Rule XIX, the Court has carefully considered the differences between the sanctions of disbarment and suspension, which differences are both substantive and significant. A suspended lawyer remains a lawyer during the period of suspension, retains a license to practice, but cannot practice law during the term of the suspension. However, one who has been disbarred loses his license to practice law. A suspension is imposed for a limited time, currently a maximum of three (3) years. An attorney who has been disbarred but not declared to be "permanently" disbarred under these amendments may apply for readmission after a period of five (5) years. The granting of readmission is within the sole discretion of the Court and is based upon the strict criteria enumerated in Rule XIX, Section 24(E). Unless such readmission is petitioned for and is granted, a disbarment is effectively permanent.

The amendments we now adopt recognize that there are some types of misconduct that are so serious that where the sanction of disbarment is imposed, an application for readmission will not be considered.

KIMBALL, Justice, concurring in part and dissenting in part

I concur in part and dissent in part from this court's Order, dated July 19, 2001, which amends the Rules for Lawyer Disciplinary Enforcement to provide for permanent disbarment. Prior to this amendment, there was no

provision in the Rules allowing this court to permanently disbar an attorney. Rather, a "disbarred" lawyer could petition the court for readmission to the practice of law after five years. The amendment retains this procedure, but allows the court, in its discretion, to effectively override this provision and impose "permanent disbarment," whereby attorney is permanently prohibited from being readmitted to the practice of law. While I commend the majority for initiating a type of disbarment that is permanent in nature, in my view, the Rules should not provide for different categories of disbarment.

Although the sanction of disbarment under the Rules has always provided that an attorney can be readmitted after five years, the term "disbarment" imparts a notion of permanency to the public and leads the public to believe that such sanction is permanently imposed. I believe that "disbarment" with the option for readmittance in five years is essentially a suspension and, therefore, misleads the public as to the ramifications of the sanction. The current rule still obfuscates the reality that attorneys who are "disbarred" will none-the-less be able to apply for readmission in five years. In my opinion, the public would be better served if this court were to increase the time an attorney guilty of misconduct may be suspended[1] and provide that all disbarments are permanent. I believe that suspension should be used in those cases where it is believed an attorney may be used in those cases where it is believed an attorney may be successfully rehabilitated and able to resume the practice of law, and I would reserve the sanction of disbarment, which by its very terms conveys an idea of

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[1] Currently, the court may fix a period of suspension not in excess of three years as a sanction for misconduct. Supreme Court Rule XIX § 10(A)(2).

permanency, for situations involving the most egregious misconduct.

Section 11. Procedure for Disciplinary Proceedings.

A. Screening. The disciplinary counsel shall evaluate all information coming to his or her attention by complaint or from other sources alleging lawyer misconduct or incapacity.

* * *

B. Investigation.

* * *

Disciplinary counsel's recommended disposition other than a dismissal or diversion shall be reviewed by the chair of a hearing committee, or the other regular lawyer member of the chair's committee, selected in order from the roster established by the board. The chair, or other regular lawyer member of the chair's committee, may approve, disapprove or modify the recommendation.

* * *

Any hearing committee whose chair, or regular lawyer member, reviews a recommendation of disciplinary counsel is disqualified from participating in further consideration of the matter.

In reviewing a recommendation of disciplinary counsel to file formal charges, the hearing committee chair shall determine if there is probable cause to believe that a violation or attempted violation of the Rules of Professional Conduct has occurred or that there are grounds for lawyer discipline pursuant to Section 9.

* * *

E. Formal Charges. If a matter is to be resolved by a formal proceeding, disciplinary counsel shall prepare formal charges in writing that give fair and adequate notice of the nature of the alleged misconduct.

(1) Disciplinary counsel shall file the charges with the board.

* * *

F. Review by Board. Review by the board shall be limited to a review of the report from the hearing committee and the record below. The respondent and disciplinary counsel should be afforded an opportunity to file briefs and present oral argument during the review by the board. The board shall adopt rules establishing a timetable and procedure for the filing of briefs and presentation of argument.

(1) Decision by Board. Following its review, the board may approve, modify, or disapprove the recommendation of the hearing committee. In reviewing the facts found by the hearing committee, the board shall adopt these findings unless the hearing committee has committed manifest error or is clearly wrong.

(2) During its review, the board shall not receive or consider any evidence that was not presented to the hearing committee, except upon notice to the respondent and disciplinary counsel and opportunity to respond. The hearing committee shall act as the initial trier of fact; the board serves an appellate review function. If new evidence warranting a reopening of the proceeding is discovered, the case should be remanded to the hearing committee.

G. Review by the Court. The board shall promptly submit to the court a report containing its findings and recommendations on each matter heard other than those that have been remanded, dismissed and not appealed, or concluded by probation or a reprimand that is not appealed. A copy of the report shall be served on disciplinary counsel and the respondent. The court shall notify disciplinary counsel and the respondent that the report of the board has been filed.

* * *

(b) Objections. In the event objections to the findings and recommendations of the disciplinary board are filed, the matter shall be assigned for oral argument and notice mailed to all counsel of record (or to the respondent, if not represented by counsel). The brief of the objecting party (or parties) shall be filed with the clerk of court within twenty days of the date of mailing of notice. The brief of the opposing party (or parties) shall be filed within twenty days after the mailing of the objecting party's brief.

* * *

(3) After the case is taken underadvisement, the court shall enter an appropriate order in due course and issue written reasons, which may be summary in nature.

* * *

Section 24. Reinstatement and Readmission.

A. Generally. A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. No lawyer may petition for rein-

statement until six months before the period of suspension has expired. No lawyer may petition for readmission until five years after the effective date of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim suspension. The court retains the discretion, in accordance with Section 10A of this rule, to permanently disbar a lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

* * *

APPENDIX E. GUIDELINES DEPICTING CONDUCT WHICH MIGHT WARRANT PERMANETN DISBARMENT, SUGGESTED BY THE COMMITTEE TO STUDY PERMANENT DISBARMENT

The following guidelines illustrate the types of conduct which might warrant permanent disbarment. These guidelines are not intended to bind the Supreme Court of Louisiana in its decision making. It is hoped that these guidelines provide useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment.

GUIDELINE 1. Repeated or multiple instances of intentional conversion of client funds with substantial harm.

GUIDELINE 2. Intentional corruption of the judicial process, including but not limited to bribery, perjury, and subornation of perjury.

GUIDELINE 3. An intentional homicide conviction.

GUIDELINE 4. Sexual misconduct which results in a felony criminal conviction, such as rape or child molestation.

GUIDELINE 5. Conviction of a felony involving physical coercion or substantial damage to person or property, including but not limited to armed robbery, arson, or kidnapping.

GUIDELINE 6. Insurance fraud, including but not limited to staged accidents or widespread runner-based solicitation.

GUIDELINE 7. Malfeasance in office which results in a felony conviction, and which involves fraud.

GUIDELINE 8. Following notice, engaging in the unauthorized practice of law subsequent to resigning from the Bar Association, or during the period of time in which the lawyer is suspended from the practice of law or disbarred.

GUIDELINE 9. Instances of serious attorney misconduct or conviction of a serious crime, when the misconduct or conviction is preceded by suspension or disbarment for prior instances of serious attorney misconduct or conviction of a serious crime. Serious crime is defined in Rule XIX, Section 19. Serious attorney misconduct is defined for purposes of these guidelines as any misconduct which results in a suspension of more than one year.

Approved by Supreme Court July 19, 2001, effective Aug. 1, 2001.